EMPLOYMENT TRIBUNALS

Claimant: Mr J James

Respondent: Lancaster Motor Company Ltd

Heard at: Birmingham **On:** 3 – 7, 10 – 14, 17 and 18 February 2020 and 17 and 18 March (in chambers)

Before: Employment Judge Miller
Mrs Fox
Mr Kelly

Appearances

For the claimant: In person
For the respondent: Mr Green - Counsel

RESERVED JUDGMENT

1. The claimant's claim for constructive unfair dismissal is unsuccessful and is dismissed
2. The claimant's claims of direct discrimination because of race were presented out of time and it is not just and equitable to extend time so that the Tribunal does not have the jurisdiction to consider them
3. The claimant's claims of harassment related to of race were presented out of time and it is not just and equitable to extend time so that the Tribunal does not have the jurisdiction to consider them
4. The claimant's claim for payment of untaken annual leave on termination of employment under the Working Time Regulations 1998 is unsuccessful and is dismissed
5. The claimant's claims of unauthorised deductions from wages were presented out of time and it was reasonably practicable for the claims to be brought within the applicable time limit so that the tribunal does not have the jurisdiction to hear the claims.

6. The claimant's claims for breach of contract are not successful and are dismissed
7. The claimant's claim that he was denied a daily rest period in breach of regulation 10 of the Working Time regulations 1998 was presented out of time and it was reasonably practicable for the claim to be brought within the applicable time limit so that the tribunal does not have the jurisdiction to hear the claim.
8. The claimant's claim that he was denied a weekly rest period in breach of regulation 11 of the Working Time regulations 1998 is unsuccessful and is dismissed.
9. The claimant's claim that he was denied a rest break in breach of regulation 12 of the Working Time regulations 1998 was presented out of time and it was reasonably practicable for the claim to be brought within the applicable time limit so that the tribunal does not have the jurisdiction to hear the claim.
10. The claimant's claim that he was not given an itemised pay statement in accordance with section 8 of the Employment Rights Act 1996 is unsuccessful and is dismissed
11. The claimant's claim that he was not given a statement of initial employment particulars or a statement of changes under section 1 and 4 of the Employment Rights act 1996 respectively is unsuccessful and is dismissed

REASONS

Introduction

1. The claimant, Mr James, was employed by the respondent as a Sales Executive from either 27 October 2014 (claimant) or 17 November 2014 (the respondent). The claimant initially commenced his employment with Colliers Motor Group (Colliers) who were then taken over by the respondent on 9 June 2016. Both Colliers and the respondent operate retail motor businesses specialising in the sale of prestige motor vehicles (as described by the respondent) and particularly, in respect of the site at which the claimant worked, vehicles produced by Jaguar Land Rover.

2. The claimant says that from February 2015 he was subjected to discrimination on the grounds of his race which the claimant describes as half Indian. Then, the claimant says, he was subjected to unreasonable acts at the hand of the respondent from 11 December 2017 culminating in his resignation with immediate effect on 22 February 2018.

3. Following a period of early conciliation from 5 March 2018 to 19 March 2018, by a claim form dated 20 March 2018 the claimant brought claims, broadly, of constructive unfair dismissal, race discrimination and breach of contract.

Issues

4. There was a case management hearing on 2 October 2018 at which employment Judge Findlay sought to clarify and identify the issues with the claimant. There was insufficient time at that hearing to agree an identified list of issues with the parties so that the claimant was ordered to clarify which claims he was bringing and provide detailed information about his claims of direct race discrimination and constructive unfair dismissal. The claimant wrote to the tribunal and the respondent on 15 October 2018 withdrawing a number of claims and clarifying some of the others, and then on 30 October 2018 the claimant provided a document he called "schedule of constructive dismissal chronology"; a document called "addendum schedule of pertinent information to 21 June 2018" and a document called "schedule of race discrimination (since 22.11.17 or date of knowledge)". There was then further correspondence between the parties requiring the claimant to further particularise his claim and the respondent submitted an amended response on 27 November 2018. There was in the interim further correspondence and applications from each of the parties which we do not set out here and on 5 February 2019 Employment Judge Findlay held a further case management hearing at which the list of issues was finalised. The list of issues set out in the case management summary of 5 February 2019 incorporated other documents produced by the parties.

5. Mr Green for the respondent had helpfully produced a consolidated list of issues incorporating the issues set out in the case management order of 5 February 2019 and the associated documents. The claimant was given time at the start of the hearing to review that list of issues and confirm that it was correct, and he did so.

6. The consolidated list of issues is annexed to this judgment, and following the withdrawal of a number of claims prior to the hearing, now relate to the following claims:

    a. constructive unfair dismissal
    b. wrongful dismissal
    c. direct discrimination because of race
    d. harassment related to race
    e. unpaid annual leave under the working Time regulations
    f. unauthorised deductions from wages
    g. breach of contract
    h. breach of regulations 10 and/or 11 working Time regulations
    i. failure to provide a statement of initial employment particulars - section 38 Employment Act 2002
    j. reference under section 11 Employment Rights Act 1996 - failure to provide statement of initial employment particulars and failure to provide pay slips

7. During the course of the hearing, the claimant withdrew the following specific allegations in relation to his claims of direct discrimination and harassment:

   (vii) e. regarding 10 May 2016, Mr James clarified that the complaint is that Neil Thomas should have dealt with his grievance but instead referred it to David Clark, meaning that there could be no appeal; and

   (vii) q. on 9 February 2018 (received by the claimant on 16 February) by the claimant being told that disciplinary allegations relating to him using his personal emails contact customer were being proceeded with; this is said to be discrimination by Mr Delo/the respondent's HR department

8. The withdrawal of allegation (q) arose on Friday 7 February while the claimant was being cross-examined. He appeared unable to explain why either Mr Delo or someone in the respondent's HR department had decided to pursue the disciplinary actions against the claimant because of his race. The claimant then said that he would withdraw that allegation. The claimant was warned that, on the face of it, this allegation was the only allegation of race discrimination that was potentially in time. Withdrawing this particular issue would therefore create an additional hurdle for the claimant in seeking to show that the tribunal had jurisdiction to hear his claims of direct discrimination and harassment. The claimant was therefore required to answer the question that had been put, but was given until the following Monday morning to make a decision as to whether he wanted to withdraw that particular allegation or not. The tribunal started early on Monday morning at 9.30 in order to ensure that all the evidence could be heard and at the start of that day the claimant confirmed that he did wish to withdraw allegation (q).

9. The following Friday, 14 February 2020, the claimant cross-examined Mr Delo. In the course of cross-examination, the claimant asked Mr Delo whether he recognised that he was of Asian heritage from the photographs he had sent in. Mr Delo said he could not tell. The claimant then asked Mr Delo if, looking at him then in the tribunal room, he would recognise that the claimant was of Asian or non-white heritage. The exchange went as follows

   Claimant: looking at me am I white or am I brown
   Mr Delo: brown
   Claimant: would you say Indian or Pakistani
   Mr Delo: I wouldn't know
   Claimant: would you say I am white
   Mr Delo: I wouldn't know. Could have a good sun tan not clearly..

10. Towards the end of his submissions, around 3:45 PM on Tuesday 17 February, the claimant raised the question of whether he could change his mind about withdrawing allegation (q). This was on the basis, as asserted by the claimant, that Mr Delo's answers in cross examination had confirmed that he had racist tendencies by making a racist comment as set out in paragraph 9 above. The claimant said that Mr Delo's

evidence was denigrating, humiliating and racist and he compared it to a "1970s" type of comment.

11. The claimant was therefore asked by the Tribunal whether he was making an application to amend his claim, and he said that he was. The respondent was asked for their view on the claimant's application and said that firstly, it was not at all obvious that Mr Delo's comments were racist and secondly that the timing of the application was so late that the balance of prejudiced in seeking to amend the claimant's claim to re-include allegation (q) would fall firmly against the respondent so that the claimant's application should not be allowed. Specifically, the respondent drew the tribunal's attention to the fact that the claimant had not sought to amend his claim either immediately after the comment was made on Friday, at any time on the Monday after the weekend when he would have had time to think about it or even at the start of his submissions. The claimant waited until the very last minute to consider reintroducing this issue.

12. As the claimant had not made full considered submissions based on the well-known test in *Selkent Bus Co Ltd v Moore,* [1996] ICR 836 he was invited to explain why given the extreme lateness of his application the prejudice to him in not allowing his application would outweigh any prejudice to the respondent in allowing it. The claimant said that given what the respondent had said he would withdraw his application. Mindful of the serious impact of this decision on the claimant's claim, the Tribunal adjourned to give the claimant time to consider what he wanted to do. Unfortunately, however, because of the extreme lateness of the claimant's application (being 3.45 pm on the last day of a 12 day hearing) and in light of the time that had elapsed since Mr Delo's comments (including a full weekend) during which the claimant could have made an application to amend his claim, the Tribunal was only able to adjourn for a very short time - between five and 10 minutes - to allow the claimant time to consider whether he wished to proceed. When the claimant returned from the adjournment, he confirmed that in fact he wanted to bring matters to an end, and he would not be pursuing his application to amend his claim.

13. In respect of the claims of harassment, the claimant told the Tribunal that he was relying on all of the allegations now set out as direct discrimination except allegations (e) and (k).

14. Finally, in respect of the alleged breach of regulation 11 Working Time Regulations 1998. No evidence was brought or submissions made about a weekly rest period. However, we did hear evidence about alleged breaches of regulation 12 – daily rest breaks. We have therefore, in the interests of justice, considered the claims under both regulations 11 and 12.

The hearing

15. The respondent was represented by Mr Green of Counsel and the claimant represented himself. The claimant was a former solicitor who, he said, had specialised in personal injury. He had been a solicitor for about 15 years until February 2013 so had some experience of litigation. However, the Tribunal was aware that the claimant said during the hearing that he was not an employment lawyer and was not familiar with the employment tribunal process. The tribunal therefore sought to assist the claimant in ensuring the correct questions were put dealing with the matters set out in the list of issues.

16. The tribunal had an agreed bundle of documents of 1802 numbered pages and the claimant had also provided an additional bundle of 74 numbered pages. Further documents were provided during the proceedings and the circumstances of these documents are explained as part of the findings as necessary.

17. The claimant provided a witness statement of 51 pages and gave evidence. The claimant also provided witness statements from
    a. Ian Simmonds – Vehicle Technician until December 2018; and
    b. Sohan Singh – Sales Executive until March 2016

18. Mr Singh attended to give evidence and the respondent said that it did not wish to challenge the evidence of Ian Simmonds so Mr Simmonds dd not attend to give evidence.

19. The respondent produced witness statements from:

    a. Matt Line Hayward – Senior HR Business Partner
    b. Scot Bullock – Claimant's line manager until approximately November 2016
    c. Paul Ivory – Divisional Sales Director - continuing
    d. Richard Clough – Acting Head of Business 1 November 2016 – 31 March 2017
    e. Hayley Keatinge – Head of Business at Audi Erdington - ongoing
    f. Amberley Wood – HR Shared Services Team Leader - ongoing
    g. David Koulakis – Business Improvement Manager and Temporary General Sales Manager August – November 2017
    h. Richard Roberts – Temporary Head of Business June – October 2017
    i. Neal Delo – Head of Business 2 October 2017 – 31 August 2019
    j. Joanna Newell – Head of HR Shared Services until 1 April 2018 then Head of HR operations (ongoing)

20. All the respondent's witnesses gave evidence except for Richard Clough who was unable to attend for personal reasons. Mr Clough's evidence has not therefore been tested in cross examination and the tribunal has given it such weight as is appropriate in the circumstances.

21. Due to the volume of documents and judicial availability, we adjourned for the first two days to read the documents. Unfortunately, Mr Spencer who was the appointed employer side member of the tribunal was taken ill on Tuesday 4 February and was unable to continue with the hearing. The parties were asked for their representations as to how they wished to continue. The claimant was content, if necessary, for the hearing to continue with two members - he was understandably anxious to conclude proceedings. The respondent was not content to continue with two members. Fortunately, Mrs Fox was available to take over the role of employer side member as the tribunal had not heard from any witnesses at that point. We therefore adjourned for a further day to enable Mrs Fox to read the witness statements and key documents and the evidence commenced on Thursday.

22. This meant, unfortunately, that there were now two days fewer in which to hear the case than had originally been timetabled. We discussed with the parties a revised timetable which initially anticipated that there would be time for closing submissions on Monday 17 February.

23. In the event, the witness evidence was not completed until 3:55 PM on Monday 17 February leaving the last day, being Tuesday 18 February, for submissions which we heard. The respondent's submissions were completed by approximately 12 o'clock on Tuesday and the claimant presented his submissions after lunch. The claimant, despite having three hours to deliver his submissions, did not manage to complete them. However, he was reading them out so that he was able to give the tribunal the final pages to consider.

Findings

24. We heard a great deal of evidence from the 12 witnesses and were referred to a great many pages in the almost 2000 page bundle of documents. This case extends over approximately three years and deals with a number of incidents. We have made such findings as are necessary to decide the case that was put before us and, consequently, we have not made findings on every dispute of fact. Where we have been required to make findings about disputed issues, we have made decisions on the balance of probabilities.

25. We observe, however, that the claimant's evidence was consistently confusing and difficult to follow. The claimant's witness statement ran to 232 paragraphs over 51 pages but unfortunately appeared to struggle to set out a useful narrative explanation of his case. This is in stark contrast to the witness statements of Mr Simmons and Mr Singh who gave evidence for the claimant and it appears that were assisted (quite reasonably) by the claimant in the preparation of their witness statements. In giving his own evidence (both written and in cross examination) the claimant frequently conflated the giving of evidence with the making of legal submissions and spent a great deal of time

concentrating on the detail of perceived technical legal defaults by the respondent at the expense of explaining what had actually happened.

26. While we have tried very hard to construct a narrative explanation of this case there will, regrettably, be gaps where we have been unable to identify precisely what the claimant asserts happened.

Commencement of the claimant's employment

27. The claimant commenced his employment with Colliers, the predecessor employer to the respondent, when his friend, Gary Phipps, had suggested that he would be able to take on the role of concierge. The claimant had previously been a solicitor and although this was a significantly less well-paid role than as a solicitor, the claimant said that he needed the money.

28. Prior to his appointment as concierge, the claimant had been suggested by Mr Phipps for the role of product specialist, or genius, and was interviewed by Mr Bullock. Mr Bullock was reluctant to appoint him. He said, in respect of the claimant's initial interview for the Product Specialist role, that "He was scruffy when he arrived and brought one of the receptionists to tears with his aggressive manner. I informed Gary of the above and that he was not the right person for the Product Genius role or for the team." The claimant denied this in his submissions although did not bring any direct evidence. We prefer the evidence of Mr Bullock on this issue. His evidence reflects the statement he gave to Matt Line Hayward on 5 July 2016 (page 508), which was that the claimant was blunt and rude both to Mr Bullock and to the receptionist on the day of the interview.

29. Accordingly, we find that the reason that Mr Bullock did not appoint the claimant initially to the role of Product Specialist was that he was not suitable for the job.

30. The next two disputed issues in this case are the claimant's start date and whether he was given a Statement of his Main Terms of Employment.

31. In respect of his start date, the claimant says in his witness statement that it was "around 20 October 2014". The respondent did not directly contradict that and provided no direct evidence of a different start date. We therefore accept the claimant's evidence that his employment with Colliers started on 20 October 2014.

32. In respect of the provision of a statement of main terms, the claimant says in paragraph 4 of his witness statement that "only after I complained to Mr Phipps did I receive the new contract". This was following the claimant's appointment as a Sales Executive when Mr Bullock became the claimant's line manager. The claimant's witness statement appeared to say that it was Mr Bullock who had failed to provide the contract. The

claimant said in cross examination that he had received a contract but sent it back because it was wrong. He said he returned it to Gary Phipps because the start date was wrong on the first page and he didn't read the rest.

33. The claimant does not state in his witness statement that the start date, or anything else, in the contract he was given was wrong. He is also unclear when it was provided but it appears that it must have been early 2015.

34. We find, therefore, that the claimant was given a contract of employment in or around January or February 2015. We do not know what the terms set out in that contract are because we were not shown a copy. However, we refer below to the transfer to the respondent and the contractual terms that applied to the claimant subsequently. We do not need, in light of the findings below to make any findings about the contractual terms under which the claimant was employed by Colliers

35. In any event, the claimant was given a contract on 1 August 2017 by the respondent which he signed.

The period from 2 February 2015

36. This refers to allegation (a) in the list of issues. The claimant asserts that "Mr Bullock's associated tenure affecting me, ran from Monday 2nd February 2015 until April 2016. There were so many incidents during which in morning meetings where he would make derogatory racial statements and mimicking, that it would be impossible to catalogue them. However, it was common for him to state and condone others using the following terms - "Rangoon", "chinky China man", derogatory physical mimicking of Asian's "side to side head wobble, with accent", negative attitude to Asian customers and comments - "you know what they're like" and so on"

37. The claimant was appointed to the position of Sales executive on 2 February 2015 when Scott Bullock became his line manager.

38. The claimant's evidence in his witness statement on these allegations was somewhat sparse. The claimant refers to feeling perturbed in his dealings with Mr Bullock who, he says, was often dismissive, awkward and hostile towards him. He refers to the sales meetings each morning and the claimant says he often found them uncomfortable "with the tense and pervasive atmosphere when discussing Asian customers". He said specifically that Mr Bullock referred to a Chinese customer as a 'chinky China man' and that in his presence Mr Bullock would allow derogatory comments about Asian customers using denigrating terms such as "Rangoon". The claimant says that this had a negative effect upon both him and Mr Singh. However even in his witness statement, the claimant does not attribute the use of the word "Rangoon"; saying "you know what they're like"; or physical mimicking of Asians "side to side head wobble,

with accent" to Mr Bullock. Instead, he accuses Mr Bullock of not taking issue with other people who engage in such discriminatory language and acts.

39. In cross examination the claimant confirmed that he had not heard Mr Bullock use the word "Rangoon" and nor had he seen him mimic a "side to side head wobble". In respect of the latter act, he said that he had heard from other people that Mr Bullock had done it and in respect of the former he did not assert that in fact Mr Bullock had ever used the term Rangoon. Regarding "you know what they're like" this turned into "Rangoon and them lot" in cross examination, but in any event the claimant said that he had not heard Mr Bullock say this. What he said was that a couple of other guys particularly MP and AW had a tendency to say racist things, and that Mr Bullock laughed along with it.

40. We were referred to what the claimant said was a contemporaneous note recorded on his iPad of the "Chinky china man" comment. This was, by the claimant's evidence, time stamped as 21 March 2016. This was the only allegation of a racially offensive comment levelled directly at Mr Bullock and by the claimant's own evidence the only time Mr Bullock was alleged to have said it. We accept the claimant's evidence of this comment. The claimant was not challenged that the record of the comment was made at the time or that it accurately reflected something that was said. The only challenge was that it was not recorded that it was said by Mr Bullock. We accept that claimant's evidence that it was. He fairly conceded that Mr Bullock had not said any of the other racist terms and we accept the claimant's explanation for recording what Mr Bullock said in the team meeting – that he happened to have an iPad with him.

41. We also refer to Mr Bullock's meeting with Matt Line Hayward on 5 July 2016. When asked if he made the comment, Mr Bullock said

"Honestly, no. Well I don't recall ever saying that. We get all walks of life through this showroom. We're not stupid to know that, probably 75/80% of our day to day customers are foreign. From when I first started with Colliers, when Land Rover wasn't popular, it was on the odd occasion that you probably see an Asian gentleman. Chinese people yes on the odd occasion, one every six months, because they don't generally buy our product. The Asian community certainly do. I've always encouraged all of my sales team, because this is what I was told years ago, those are the best people you want to get in with. Because if you can sell to an Asian and your good, you'll get his whole family. Your not talking one car, your talking 10/20 and that's the motto I've always tried to encourage the whole of my sales team. No matter who walks through that door, whether your a builder in your building clothes or your suited and booted in £10k Armani suit, treat everyone the same".

42. In our view, this reflected a pragmatic acknowledgement that using racist language was likely to be bad for business, rather than a recognition that it is unacceptable. In the same meeting, Mr Bullock said, in respect of

other people using racist terms that he told them "You can't use that word in this environment". Again, in our view this reflects a pragmatic business decision not to use such language rather than a recognition that it is unacceptable per se.

43. We note that Mr Bullock denies in his witness statement all these allegations. However, he also says that these allegations were not made against him at the time which is not correct – Mr Line Hayward asked him about them as part of the claimant's grievance.

44. On balance we prefer the evidence of the claimant in this issue and therefore, we find that on the balance of probabilities Mr Bullock did use the phrase "Chinky China man" on 21 March 2016.

Christmas 2015

45. The next issue that the claimant raises (allegation (b) in the list of issues) is that Mr Bullock refused the claimant time off in lieu because Christmas day and New Year's Day 2015/6 fell on the Claimant's non-working days. The first time this allegation appears to be mentioned is in an email from the claimant to the Employment Tribunal on 21 June 2018 (page 103) in response to the Order of Employment Judge Self of 1 June 2018 that the Claimant provide a schedule of all acts of alleged discrimination. There the claimant says

"16/12/15 - Mr Bullock refused my request for time in lieu as Christmas and New Years days fell on my Friday weekday off. He argued that I'd lost the weekday off (Friday being my weekday rota day off) and he was quite gleeful in denying my right to days off in lieu. He wrongly understood or chose to accede to common sense but upon me insisting that he telephone HR in my presence, he had to concede that I was correct but was patently crestfallen".

46. Although the attachment to the claimant's ET1 entitled "Detailed Chronology and allegations" which set out the claimant's particulars of claim, was not initially on the tribunal file, it was provided in the bundle and this allegation is not mentioned in there. It is also not mentioned at all in the claimant's witness statement.

47. Mr Bullock says in his witness statement

"Christmas day in 2015 and New Year's Day 2016 fell on Friday which was John James rota day off. I recall he mentioned that he would be entitled to lieu days and all I said I would check with HR as I did not know the interplay with rota days off and bank holiday."

48. In cross examination, the claimant said that initially Mr Bullock had refused to give him time off in lieu and, effectively, only phoned HR to prove the claimant wrong. In fact, the claimant's evidence was contradictory – he asserted in cross examination that Mr Bullock knew he

was wrong about time off in lieu but phoned HR anyway. This doesn't make any sense, as it would leave him open to embarrassment and undermining what the claimant perceived to be his position in this interaction.

49. We accept Mr Bullock's account of this conversation. The claimant brought no evidence in his witness statement and, in any event, phoning HR was an obvious and reasonable thing for Mr Bullock to do. We find, therefore, that Mr Bullock did not refuse the claimant's request for time off in lieu – in response to the claimant's request for time off in the circumstances set out above, Mr Bullock reasonably said he would check with HR to find out the position which he did.

The claimant's request for time off on 19 March 2016

50. This relates to allegation (c) – that Mr Bullock refused the claimant time off on or about 19 March 2016. As the evidence on this matter is spread across a number of grievances, complaints and meetings, we set this history out chronologically and make our findings on the incident of 19 March 2016 after consideration of those matters. This is because it is necessary to understand how the complaints progressed and what was said to reach a conclusion on this issue.

51. On Saturday 19 March 2016, the claimant asked to leave work early so that he could visit his father-in-law who had collapsed and been taken to hospital the previous night. This is taken from the claimant's "Schedule of Racism" that he submitted to the tribunal on 21 June 2018. It was not explicitly included in his claim form. The claimant does not give any evidence of what he says happened in his witness statement. He does refer in his witness statement to his complaints about this and we deal with those below. In his "Schedule of Racism" the claimant says about this incident:

"My father-in-law collapsed and was rushed to hospital, I had been informed late at night, Friday 18/3/16 and had started working from home at 5 am and had re-arranged everything, so as to leave early to get to hospital. Mr Bullock refused my request because " I (he) couldn't take time off to see my (his) uncle (actually wife's uncle), who was terminally ill and had 3 months to live", he was very nasty, abusive, inconsiderate and clearly enjoyed the refusal, despite me advising of all the steps I'd taken to ensure I'd complied with all my obligations and work commitments!"

52. In cross examination, the claimant said that he had spoken to Gary Phipps the night before about this. and had rearranged his day so that he would be in work early and leave by 2pm or 3pm at the latest. He did not say that Gary Phipps had agreed to this arrangement and none of this was set out in the claimant's witness evidence.

53. Mr Bullock said in his witness statement:

> "On 19 March 2016 John came into my office and said 'I need to go home'. Gary was present and asked him why and he responded saying that his father in law had been diagnosed with cancer. I told John that we had a large delivery of cars and given the short notice and that we were short staffed, I couldn't grant him his request to leave. I remember him looking at Gary as if to see whether he would offer a different opinion but he didn't (p.507 ET Bundle 1). After John James left, Gary turned to me and said 'he is taking the Michael'. I responded saying he would only go back to Gary later. He did wander into Gary's office later that day but Gary had already left. John James was scheduled to work to 6 pm, he wanted to leave at 1 pm but we had approximately 14 cars to get out and were understaffed. John did leave slightly earlier that day".

54. The claimant did not directly challenge Mr Bullock's evidence on this. It is not disputed that Mr Bullock had refused the claimant permission to leave early to visit his father-in-law in hospital or that, in the event, the claimant did manage to leave work slightly early at 4:30 PM, having been scheduled to work until 6 PM.

55. In cross examination, the claimant denied that the business had been short staffed on 19 March 2016. He named a number of other employees who were working. It was put to the claimant that in fact he had just named all the relevant people employed by the respondent at that time and the claimant agreed, albeit saying that that was because he knew they were all working. The claimant does not provide any evidence as to how short staffed they were (or were not) in his witness statement.

The first grievance

56. The claimant raised a complaint about this incident. It is not clear how that complaint was raised. The claimant said in his witness statement that this complaint was raised on 20 March and refers an email at page 472. This is an email dated 20 March 2016 but it does not refer to this incident. It refers to an unrelated matter in connection with the sale of a car. It does say, at the end of the email, that the claimant wished this complaint to be added to the complaint he had already made. We note also that the claimant said in that email

> "This also reminds me of a similar problem which arose last year. I drafted notes for my meeting in June 2015, I attach the same hereafter:-
>
> "Protection from harassment Act 1997 – s.1 (1) a/b 92) & civil remedy s.3 (1-2)
>
> Equality act 2010 – ethnicity
>
> Harassment – undermines dignity – environment offensive/humiliating/degrading

Talking behind my back at meeting 16.6 (Monday) & Friday (13.6)"

57. In his submissions the claimant said that the complaint was raised by way of an email dated 21 March 2016 which, if it exists, is not in the bundle. In cross examination the claimant at first denied that he had made a verbal complaint about the incident on 19 March 2016 and then was uncertain.

58. There is no other record of a complaint in relation to the incident on 19 March 2016 so we conclude that the claimant must have made a verbal complaint. A complaint about the incident of 19 March was, in any event, certainly investigated and the claimant received an outcome (as to which see below).

59. Again, this is not set out in the claimant's witness statement (although it is in an email from the claimant of 21 June 2018, as to which see below).

60. Scott Bullock and the claimant were initially interviewed By Neil Thomas in response to that grievance, the claimant on 13 April 2016 and Mr Bullock on 19 April, while both were employed by Colliers.

61. In that interview, the claimant set out what he says happened on 19 March 2016. He says that the previous evening (18 March 2016) he had contacted Gary Phipps (at 23.36) and told him that his wife's stepfather had been taken to hospital and a throat tumour had been detected and that the claimant wanted to be there to support his wife.

62. The notes then record that the claimant again emailed Gary Phipps at 09:06 on 19 March explaining that he had started work at 5am, and had rearranged his day to enable him to leave at 1pm to go to hospital. That email is titled "Request for time off denied – grievance" (although the tribunal has not seen a copy of that email) and the notes then say "At this point John had felt that he had taken all reasonable steps to minimise the impact on the business through his absence".

63. The remainder of the record of the meeting with the claimant records further times the claimant feels he was treated unfairly by Mr Bullock. It refers to him bullying the claimant and undermining his ability to sell cars. In that grievance meeting, Mr Thomas records that "John also recounted instances of expressions being used such as "Rangoon" and "one of your lot" being used in his company". This allegation is not clearly attributed to Mr Bullock in these notes and the claimant ultimately did not say that Mr Bullock had said these things, rather that he had failed to prevent others from doing so. Except for this non-specific allegation, there is nothing in these notes of this meeting that suggest the claimant considered that Mr Bullock's actions were related to the claimant's race. In our view, the context of this meeting was very much that the claimant disagreed with

some of Mr Bullock's decisions and, to use a shorthand, the claimant did not like being managed by Mr Bullock.

64. In his meeting, Mr Bullock again recounts the circumstances of the claimant's appointment – that he had not thought that the claimant would be suitable – but that now he was a fully-fledged member of the sales team. In respect of the specific complaint about the claimant's request for time off, Mr Bullock says that they were very busy, and the claimant was required to stay and assist but, in any event, he left at 4.30pm.

65. Mr Bullock summarised his perceived issues with the claimant. Effectively he was of the view that the claimant was not a team player; "'he does not ask, he tells'' and pays no regard to the staffing levels required despite having visibility of the holidays/days off of others"; and it is recorded that "John will very often be in Gary's office at the beginning and end of the day and that perhaps leads to an air of distrust between them". Mr Bullock denied ever using the word "Rangoon" in the derogatory way referred to.

66. In respect of the specific issue relating to 19 March 2016, Mr Bullock said that the day in question, was going to be a particularly busy day with between 12 - 14 vehicle handovers diarised for that day and despite the fact that the claimant may have rearranged his day he would still be needed to contribute. Mr Bullock denied the claimant's request to leave early but in the event he left at 4.30pm (rather than 6pm) but that proved to be too late to be of assistance to the claimant.

67. The grievance outcome was communicated to the claimant in a letter dated 23 May 2016. Mr Clarke did not uphold the claimant's complaints of bullying, victimisation or discrimination, but concluded that there was a breakdown in the relationship between the claimant and Mr Bullock and that this would be usefully addressed through mediation. Particularly, he recognised the perception of the Claimant's relationship with Gary Phipps as a potential source of the problem.

68. Mr Thomas did not make any specific findings about the reasonableness or otherwise of Mr Bullock's decision to refuse the claimant time off and did not refer to the allegations relating to race discrimination at all.

69. In cross examination, the claimant agreed that in the circumstances, this was a reasonable conclusion for Mr Clarke to reach on the evidence presented to him.

The first grievance appeal

70. The claimant appealed to Mr Clarke against the grievance outcome on 26 May 2016. He said, in cross examination, that the reason he appealed, despite agreeing that the outcome was reasonable, was because of procedural flaws in the process.

71. The claimant's grievance appeal sets out a number of issues:

a. The grievance took over 8 weeks to conclude. The claimant says this is a breach of the ACAS Code of Practice of March 2015.
b. The claimant refers to breaches of the Code 33,40,41,42,43,44 and 45. He does not say what that means
c. That he was not informed in writing of the time and date of the initial meeting. The claimant asserts that this is a statutory obligation.
d. There was a delay of 4 weeks and 2 days between the grievance and the initial meeting, which the claimant says is a breach - we assume he means of the ACAS Code
e. He says his complaint about being refused time off was a simple issue
f. He says the other allegations have not been dealt with properly although he does not say at this stage in what way
g. Finally, the claimant asserts that there is a statutory obligation for Neil Thomas (the investigating officer) to make the determination on the claimant's grievance, not Mr Clark.

72. We observe here that this grievance appeal was set out in a form that was to become familiar. A number of non-specific allegations made alongside confusing and often inaccurate legal references.

73. By this date, it must have been apparent that the business was soon to transfer to the respondent as the claimant concludes “In the circumstances, I will forward this matter to Messrs Jardines and request they reconsider this again”.

74. In fact, the claimant's grievance appeal was sent to HR Caddy, Colliers’ HR advisers, to consider and a meeting was arranged for 2 June 2016. Despite this, the claimant says in his witness statement that he was “estopped from any appeal process”. In cross examination, it was put to the claimant that there was an appeal and he eventually agreed that there had been an appeal to HR Caddy (Nicola Clachan), that this had been by way of a rehearing and that HR Caddy were independent.

75. There was a meeting on 2 June 2016 and the outcome of that meeting was sent to the claimant in a letter dated 6 June 2016.

76. Nicola Clachan recorded in that letter what the claimant had said his grievance was.

a. He referred to the incident on 19 March 2016. We note that in this meeting, the claimant again said that he had contacted Gary Phipps the night before but does not say that Gary Phipps gave him permission to leave early. The claimant now also says apparently for the first time that he raised it with Gary Phipps who had said that he could not overrule Mr Bullock who was the claimant's line manager and that he had left at 5pm (rather than 4.30pm as previously stated).

b. The claimant raised issues relating to racist language. He said, and confirmed in cross examination, that he could not recall Mr Bullock using the term “Rangoons”, but that he had heard him use the terms “bhaji” and “chinky chinky chinaman”. In cross examination the claimant agreed that the only comment he had, and was continuing to, rely on was the “chinky chinky chninaman” comment. (We note that the reference to “bhaji” does not appears anywhere else in the bundle, the pleadings, the claimant's witness statement or in cross examination of any of the witnesses).

c. In this appeal, the claimant says that other people in the team get a thank you and he never does.

77. The outcome of this grievance appeal was that the wider issues surrounding the alleged different treatment of the claimant by Mr Bullock required further investigation. As the transfer to the respondent was imminent, Nicola Clachan decided that the new investigation and reconvened appeal hearing would be taken over by the respondent. The claimant, in cross examination, reluctantly agreed that this was a reasonable decision. We agree that it was reasonable – it would clearly enable a new, independent investigation of these now ongoing issues to be considered.

The transfer to the respondent

78. On 8 June 2016 the claimant's employment transferred under the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) to the respondent.

79. Mr Bullock alleges that on this date, during a meeting about the transfer, the claimant said “if they get rid of me I will sue them for racism and ageism”. In cross examination the claimant denied that this happened. We were shown a copy of what was said to be a contemporaneous note made by Mr Bullock recording the exchange. It says

“John James > on [announcement] of takeover if they get rid of me I will sue them for

1. Racism
2. Ageism

Debbie Lees > what do you mean? Why would you do that and under what grounds

JJ Well they will have to prove it!! Everytime I go on holiday I sue the holiday company”

80. The claimant denied that this conversation took place. Mr Bullock said he had started making a note of things that were said or that he didn’t agree with as a “safety net” in case anything came along. He said he didn’t trust Gary Phipps – in fact he said he didn’t trust anybody. Mr Bullock also said

that the grievances the claimant had raised against him had come as a shock.

81. In our judgment, the claimant did make these comments. The claimant had already by this time referred to various legal provisions in his grievances including breaches of the ACAS Code, the Protection from Harassment Act and the Equality Act. The claimant subsequently said that he enjoyed litigation and challenging people, and his circumstances were such that he often needed money. The claimant's comments and the circumstances in which Mr Bullock recorded them are entirely consistent with other evidence from both witnesses.

82. In respect of the transfer of the business, Matt Line Hayward, Senior Human Resources Business Partner of the Respondent, says in his witness statement that he went through the respondent's documents with the transferring staff. These included the respondents code of conduct, job descriptions and finding documents on the respondent's intranet. He says that he does not remember the claimant attending the meetings arranged for these purposes and he does not recall the claimant saying that he did not have copies of his job description. In cross examination, Mr Line Hayward said that contracts were sent out around 4 – 6 weeks after the transfer. The claimant did not effectively challenge that evidence in cross examination and we accept that Mr Line Hayward's evidence on this point is accurate: contracts were sent to transferring employees 4 – 6 weeks after 8 June 2016 and information about the other company documents was distributed or provided withing the same period.

Consideration of the grievance appeal by the respondent

83. Mr Line Hayward was appointed to re-hear the claimant's grievance and met with him on 28 June 2016 The clamant explained the basis of his outstanding complaints in that meeting.

84. The underlying basis of the claimant's complaint was clearly the refusal by Mr Bullock to let the claimant leave early on 19 March 2016. At this meeting, the claimant says that Gary Phipps had told him on that day in the morning that he could leave early, just to let Mr Bullock know. The claimant says that when he told Mr Bullock that he needed to leave early, Mr Bullock said "my uncle has got terminal cancer and I can't get the 'F'-in time off (Scott swears all the time), so I don't see why you should (para phasing)".

85. The claimant says that he then went to see Gary Phipps about it, but he was not there. Mr Line Hayward asked the claimant three times in the meeting on 28 June, in three ways what he thought the basis of Mr Bullock's treatment of the claimant was. He asked "Do you think it's a personal thing to you, to which the claimant replied "If I'm perfectly honest not entirely. Scott is awkward with everybody, but particularly awkward with me". Then Mr Line Hayward asked "Has he ever said anything or is that how you feel? The claimant said "he doesn't like the fact that I'm - he

said something along the lines of "I've never worked in a dealership where one of my sales staff is closer to Head of Business, that I am and I don't like it". Because I don't like it, I'm not keen". Thirdly, Mr Line Hayward asked "In your opinion, why do you think there is differential treatment? The claimant said "If I'm speaking honestly and truthfully, he decides to have his little favourite and anybody who isn't his little favourite or doesn't defer to him I'm my own person, I'm coming up to 50, I don't need to creep or anything, I do my job. up-to-date, I'm never ill, I don't believe in illness, I've never had any sick time off. I just get on with my job. I don't sit around gossiping or messing about. Sometimes I don't get involved with his jokes, like all the others, but I don't see why I should, I'm here to work."

86. In none of those responses did the claimant assert that the basis for his treatment was his race. When this was put to the claimant, he said that the reason he had not said the treatment was because of race was because he couldn't prove it.

87. It was only when Mr Line Hayward finally prompted the claimant about discrimination that he gave examples of the use of racist language by people other than Mr Bullock saying Rangoon and referred to a former colleague experiencing racist language. The claimant also referred to the use of the phrase "chinky chinky chinaman" as discussed above. The claimant said he could provide the iPad printout to Mr Line Hayward, but we accept Mr Line Hayward's evidence that he never did.

88. The claimant's view was that Mr Bullock went along with the racist banter and language and that as a manager he should have stepped in to stop it.

89. The claimant raised a number of other issues in that grievance which we do not need to consider in detail except to say that the claimant believed Mr Bullock treated many employees badly. The claimant also referred again in that meeting to research that he had done into the Equality Act (amongst other things).

90. Mr Line Hayward asked the claimant why he felt Mr Bullock had a personal vendetta against him. The claimant said

"Haven't got a clue. If I'm gonna be truthful, possibly he doesn't like me, because

- Relationship with Gary.
- Intimidated because I've got some intelligence, experience and knowledge and he doesn't like that. That's the only thing I can think of".

91. Again, the claimant did not mention race, but did give examples of when Mr Bullock had treated other people who did not share the claimant's ethnicity badly.

92. The claimant's complaint about 19 March 2016 was put by Mr Line Hayward to Mr Bullock as part of his grievance investigation. Mr Bullock gave a different account. He said that the claimant had not asked for time off, but rather had just said "I need to go home". Mr Bullock also said that Gary Phipps was there at the time and asked why. Mr Bullock gave, effectively, the same account that he had given previously.

93. Mr Bullock denied swearing at the claimant, although he did agree that he sometimes used foul language. Mr Bullock also denied using racist language but did confirm that he had heard other people using racist terms. However, he said that he had told them to stop.

94. Mr Line Hayward also interviewed Colin Smith and Andrew Beddall. Andrew Beddall and Colin Smith were people that the claimant said were witnesses to the allegations he was making about Scott Bullock.

95. It is apparent from the notes of the interviews with Mr Andrew Beddall and Colin Smith that Mr Bullock used foul language and an aggressive and potentially bullying management style when dealing with his staff. Mr Beddall says that Mr Bullock uses "F words quite a lot really predominantly that really what I've heard…. he can seem to stressing people a little bit is not willing to listen it's very much an attitude talking you will listen type of thing…I've not personally witnessed an absolute direct insult to anyone in particular but he can address people in a slightly uncouth slightly insulting type of mannerism".

96. Mr Smith says that Sohan Singh (another employee) had told him that he was being racially abused that on occasions he was almost in tears and saying that he would leave but that he didn't hear Mr Bullock say anything, but that it was some of the other people in the sales department who had by then left. He did say, in respect of Mr Bullock, that he snaps at people, tells people to "F off", that he was always worried about going to see him. He was, in effect, sharp, abrupt and dismissive. "Not really a way I would think a Manager handles things…".

97. Mr Line Hayward wrote to the claimant on 22 July 2016 with an outcome to the reinvestigation of his grievance. The findings were, in summary and as far as is relevant, as follows:

    a. that at times Scott Bullock's use of foul language in the workplace was inappropriate
    b. that the claimant's request for time off for his father in law could have been handled more sensitively
    c. that Scott Bullock's behaviour was not racially discriminatory

98. In cross examination Mr Bullock agreed with Mr Line Hayward that the situation on 19 March 2016 could have been handled more sensitively. Mr Line Hayward said that any allegations of discriminatory behaviours would be investigated. However, as Mr Clarke had previously found, the underlying issue was a breakdown in the relationship between the

claimant and Mr Bullock. Mr Line Hayward confirms in his witness statement that the allegations of racism against Mr Bullock were not upheld in that grievance outcome.

Our findings about 19 March 2016

99. This lengthy narrative sets out, effectively, the claimant's evidence about what happened on 19 March 2016. As mentioned above the claimant did not set out in his witness evidence to the tribunal his version of what is said to have happened. Effectively, however, in cross examination the claimant said there were enough staff in to cover the work, he had arranged to finish early so there was no reason why he could not leave early.

100. As was agreed by everyone, the situation could have been handled more sensitively. Mr Bullock agreed this in cross examination, and in his witness statement he says he was told by Mr Line Hayward to watch his swearing.

101. On balance, we prefer Mr Bullock's evidence – that the showroom was very busy, the claimant was required to be at work to complete and assist with the handovers and that Gary Phipps supported Mr Bullock's decision. Further, we accept that the claimant was able to leave slightly earlier. Although we agree that the situation could have been handled more sensitively, we find that his decision was wholly unrelated to the claimant's race and that the claimant did not believe it was at the time. The claimant provided throughout the investigation a number of different reasons for this perceived poor treatment at the hands of Mr Bullock, but his race was not one of them. Even when prompted by Mr Line Hayward for examples of discriminatory behaviour, the claimant did not refer to being refused permission to leave early and in fact referred to the actions of other employees, Mr Bullock's involvement being limited to not taking them sufficiently to task.

102. We accept Mr Bullock's evidence that he did tell other employees to stop using racist language, although we conclude from the evidence we have heard that there had been a culture under Colliers in which racist "banter" was tolerated and the reason it was stopped was for pragmatic, commercial reasons. There was corroborative evidence from Mr Smith, consistent with the claimant's evidence, that racist language had been used in the Sales department and this had had an adverse impact on another employee.

103. On the balance of probabilities, Mr Bullock did use an offensive term in reference to a Chinese person on 21 March 2016. However, even by the claimant's own evidence this was an isolated incident. Despite being prompted by Mr Line Hayward, the claimant was unable to identify any other circumstances when Mr Bullock had used racially charged language or acted in an overtly racist way. In our view, any animosity or poor treatment directed at the claimant by Mr Bullock reflected Mr

Bullock's somewhat aggressive management style, and his perception that the claimant was friends with Gary Phipps, Mr Bullock's line manager. It was, in our judgment, and specifically in respect of the incident on 19 March 2016, wholly unrelated to the claimant's race.

Mediation recommendation

104. Mr Line Hayward confirms that as a result of the grievance outcome of 22 July 2016, Gary Phipps agreed to arrange some reconciliation between the claimant and Mr Bullock but that Mr Phipps left the organisation before the meeting could be arranged.

105. Mr Line Hayward says that he offered to facilitate mediation between the claimant and Mr Bullock himself but that the claimant did not want to do that on the basis that "it would not achieve anything".

106. The claimant does not say anything in his witness statement about the reasons the mediation did not happen initially. In cross examination he said that Gary Phipps would be unable to do it as there was a conflict – that he would be unfair towards the claimant to avoid the appearance of favouritism.

107. We accept Mr Line Hayward's evidence as to why the mediation was not arranged immediately. Namely that the claimant said there was no point. The claimant produced no evidence to the contrary and his answers in cross examination made little sense. When asked why Gary Phipps could not arrange the mediation, even if conflicted, he said it had been taken out of Gary Phipps' hands and given to HR. It was not related to the claimant's race.

12 September – Mr P

108. This relates to allegation (f), namely that on 13 September 2016 a Mr P had ordered a car, paid and signed a contract. The claimant alleges that in the course of his transaction with Mr P, Mr Bullock shouted at him in the public sales showroom "John upstairs now" and that Mr Bullock called the claimant a liar. The claimant says, in his "Schedule of racism", "After a meeting with senior management, I was exonerated from any error".

109. The claimant does not refer to this incident at all in his witness statement but it is set out in an email from the claimant to Mr Line Hayward of 22 September 2016.

110. In essence, the claimant had sold a car to a Mr P who had paid £1000 in cash and wanted to pay the remaining £8616 also in cash. The claimant was aware of money laundering restrictions and went to speak to Mr Bullock about taking the remaining money as cash. The claimant's case is that he asked Mr Bullock if he would be able to take this cash, believing the limit to be £10,000, and that Mr Bullock had said it should be ok. The limit was in fact £7500.

111. In cross examination the claimant said initially that Mr Bullock told him to take the money upstairs and put it in the safe; then he said that Mr Bullock had told him to take it upstairs to the accountant and finally that he had asked Mr Bullock if *he* would hold the money to which he replied no, and had said to take it upstairs so the accountant could check it and put it in the safe.

112. Mr Bullock broadly agrees that there was an issue with the taking of cash except that he says “I told John James to go to the accountant to check we could take this amount of cash from the customer and told him he cannot leave the money with me. ... John did go and speak to the accountant but told the accountant I had agreed to take the cash, which I clearly did not”.

113. Mr Bullock’s evidence is that shortly after that on the same day, it came to Gary Phipps’ attention that cash in excess of the limit had been taken. Mr Phipps summoned Mr Bullock to the accountant’s office and told Mr Bullock that the claimant had told both the accountant (Shane Jackson) and Mr Phipps that Mr Bullock had instructed the claimant to take the money.

114. We infer that Mr Bullock denied this at that point because Mr Phipps then instructed Mr Bullock to get the claimant. Mr Bullock says he went downstairs to the office and said to the claimant in a normal voice, "Gary wants to see me and you upstairs now can you come". The claimant said in cross examination, in his schedule of racism and in his complaint to Mr Line Hayward of 22 September 2016 (in respect of which, see below) that Mr Bullock shouted at him “upstairs now”. The claimant does not set out **any** evidence at all of this incident in his witness evidence.

115. Once in the office, it is agreed that Mr Bullock accused the claimant of lying about whether Mr Bullock had approved the taking of the cash. Mr Bullock says “… I called him a liar, because that’s what he was doing”.

116. We refer at this point to a complaint made against Mr Bullock in respect of James Irvine. In his own witness statement, Mr Bullock confirms that he was reprimanded for swearing when he got into a heated discussion with James Irvine. In a statement dated 1 November 2016, Shane Jackson said that he had witnessed Scott Bullock shout across the showroom for James Irvine to “get into his office” and Mr Jackson says that Mr Bullock laid into him.

117. This evidence is wholly consistent with the claimant's account and we find that Mr Bullock did shout down the stairs for or at the claimant. We also find that the reason that Mr Bullock called the claimant a liar was because he genuinely believed that the claimant had lied to Gary Phipps about Mr Bullock approving the taking of the money.

118. It is difficult to know whether the claimant was deliberately lying about this or whether he misunderstood what Mr Bullock had said. Our experience of the claimant in the hearing was that he was frequently disingenuous. When he put questions, Mr Green had to correct his inaccurate summaries of documents and events, the claimant's answers were inconsistent on a number of occasions, the claimant's explanation about the non-disclosure of the occupational health report (see below) was fanciful and the claimant gave every appearance of changing his answers or explanations to suit the prevailing circumstances.

119. On balance, we prefer Mr Bullock's account in respect of the conversation about accepting the cash from Mr P. He did not authorise it but asked the claimant to check with the accountant. The claimant's account was wholly unreliable.

120. We do not accept that Mr Bullock's actions were related to the claimant's race. Mr Bullock also shouted and swore at James Irvine who is white. We conclude that Mr Bullock was aggressive to many of his employees regardless of race (or any other protected characteristic). We find that the reason that Mr Bullock called the claimant a liar was because he genuinely believed that the claimant was lying to Gary Phipps and, in our view, that belief was reasonable.

The G sisters

121. In September, the claimant sold two Range Rover cars to "the G sisters". They had requested some custom paintwork to these cars before collection. The claimant said that he had never previously arranged for such work to be undertaken so he obtained a price for the work from Mr Phipps of £600. The claimant says that he was also told what body shop to use for the work by Mr Bullock.

122. In the event, the paintwork was not carried out correctly and the customers complained. It was the Claimant's case, which was not disputed by the respondent, that the costs incurred in remedying the defective paintwork were in the region of £4000.

123. The claimant's complaint about this transaction (which is set out at allegation (g)) is that Mr Bullock refused to pay the claimant any commission on this transaction.

124. The claimant does set out some evidence in his witness statement about this transaction. The claimant asserts that Mr Bullock gave him the name of a garage who could do the work, that he was informed on the day of delivery that the work was of a poor standard and that Mr Phipps told him to deliver them in any event. The claimant says that he delivered them in the evening after a training course and did not get home until 1am the next day. He does not give any dates, but it appears from correspondence in the bundle that the cars were delivered on 15 September 2016. The claimant does not give any evidence in his witness

statement that commission was not paid for the sale of these two cars, or if not, why.

125. The claimant accepted that the respondent's commission scheme was discretionary. The scheme is reviewed annually, and the relevant annual scheme is at page 451 However. The commission scheme on a sale is separated into 2 parts – a fixed amount depending on the vehicle and a variable percentage depending on the profit. The claimant accepted in cross examination that both elements were discretionary but said that the respondent had never exercised its discretion not to pay the fixed part. It was the clear view of all the respondent's witnesses who were asked that if a car is sold at a loss, no commission is payable.

126. The claimant's case (as set out in his "schedule of racism") is that the reason commission was not paid was because he failed to complete the instant feedback on his iPad at the time of delivery. The cars were delivered at around 9pm, in the dark. The claimant said he could not complete the instant feedback because there was no 3G capability in the iPad. Mr Singh confirmed this was the case and Mr Line-Hayward did not dispute that assertion. He also agreed that it would be unreasonable to withhold commission in those circumstances.

127. The claimant's evidence in cross examination about the reason he thought the lack of feedback was the reason he did not get commission was confusing. The claimant referred to the commission scheme requiring this. When it was put to him that that is not the same as Mr Bullock telling him he would not get commission because of feedback, the claimant said "Scott Bullock advised have to complete and we were all told it". It was then put to the claimant that even if that was the case, it was because of the definition of sale, not race and the claimant said "I said to SB what happens if the customer doesn't want to do instant feedback or there is no wifi – I sent an email about that". In effect, the claimant did not answer the question.

128. However, the claimant accepted that the completion of feedback was a mandatory (albeit unreasonable in the claimant's view) part of the sales process which applied to everyone. Even if, therefore, the reason for withholding commission was because the claimant failed to complete the feedback, rather than the £4000 cost of the claimant's errors, this was for a reason related to the process not the claimant's race.

129. Mr Bullock says, in his statement, "The obvious reason why John James got no commission was because the dealership made no profit on the vehicle and it was also clear the sisters had a legitimate complaint about the state of the cars.

130. The claimant disagreed with this but did agree that he had been told the reason he did not get commission was because of the mistakes with the cars.

131. We prefer the evidence of Mr Bullock on this issue. It is perfectly reasonable and unsurprising that the respondent would decline to pay discretionary commission where it had made no profit because of the paintwork problems.

132. In respect of the timing of the delivery, the claimant said in cross examination that he was instructed to deliver the cars, despite the issues with the paintwork by Gary Phipps. In the disciplinary investigation meeting on 6 October 2016, however, (see below) the claimant said that *he* had agreed with the G sisters to deliver the cars on 15 September after his training course and had informed Gary Phipps of *his* decision. This in our view, was another example of the claimant changing his story to fit the circumstances.

133. The claimant said that as a result of being on training on that day, he had delivered the cars in the evening and had not made it home until 1am the next day. The claimant said it was important to deliver the cars then as they were birthday presents. However, there were other options available such as providing a temporary car pending resolution of the paintwork issues that would have meant delivery did not need to be effected then.

134. It was put to the claimant that he was concerned to deliver the cars in these circumstances because he wanted the commission - in effect this was his priority. It was clear that the claimant had some significant debts and he agreed that he needed money, despite denying that he was in any financial difficulties. We find that it was the claimant's decision to deliver the cars in the condition that he did, and the claimant's decision to do it on that day in the evening.

20 September – Mr C

135. This relates to allegation (h), which is that Mr Bullock unjustifiably accused the claimant of failing to respond to a complaint from a customer.

136. Yet again, the claimant has failed to set out any evidence of this complaint in his witness statement. The only record of this issue is in the claimant's grievance of 22 September 2016 where he says

> "I was called into to Scott's office, Tuesday 20.9. 16, to advise that I'd failed to respond to Mr C and to "sought it out". I explained I didn't have a customer of that name but he emailed me the complaint and specifically made it my error and problem. I spoke with the customer, who confirmed he'd been dealing with Surrinder Virdee, left numerous messages and had spoken with reception, the day before, who'd mentioned my name, if free to try and encourage Sid to respond. He'd written in to that effect but Scott, pounced on my name, thinking he'd found a legitimate excuse to berate me!!"

137. Mr Bullock says in his statement that he cannot recall anything about it.

138. In the investigation meeting for that grievance, the claimant confirmed that the matter had been clarified on Emax but Mr Bullock had not apologised. In cross examination, the claimant added the detail that Mr Bullock had used a “nasty demeaning tone”. This is not consistent with how the claimant explained the incident to Richard Roberts at the grievance meeting on 4 October 2016. Then he said “We spoke with Scott and I said can we check enquiry max and we did and we found out that it was Sid's customer. No apology -just pass it on to Sid. No apology given”.

139. We find that the conversation is likely to have happened but in light of the claimant's account in his email of 22 September and the meeting on 4 October, we find that Mr Bullock did not act unreasonably. He clearly had a reason for thinking it was the claimant who had dealt with the customer. We do not accept the claimant's account in cross examination that Mr Bullock used a “nasty, demeaning tone”. The claimant did not say this in his email, his grievance meeting or his witness statement. Only when challenged about the incident did he come up with this detail over three years later. In our view this was an embellishment by the claimant to bolster his claim.

140. Mr Bullock may well not have apologised to the claimant but on the claimant's contemporaneous account, Mr Bullock made a mistake, but had not spoken to the claimant in a demeaning way, and there was therefore nothing for which he was required to apologise.

Banning phone use in meetings

141. The next incident that the claimant raises is that on 21 September 2016 Mr Bullock banned him from using the company phone in morning sales meetings and complimented two other colleagues (but not the claimant) for having Enquiry Max up to date. Mr Bullock is said to have taken delight in praising other, white, staff and not the claimant. This is allegation j in the list of issues.

142. Again, the claimant appears to have brought no evidence of this allegation in his witness statement but raised it as an issue in his grievance on 22 September 2016. There he says:

> “Yesterday, I had 3 hand overs and always carry my works telephone everywhere. In the morning meetings, if a new customer calls, I always excuse myself and take the call, not wishing to lose business for the company - Scott unceremoniously, in front of all enjoyed chastising me and explaining I "cannot take calls in the morning meeting" which often finish at 9:15/30, usually delayed as people are late and Scott wants to recount his personal life or go over inane issues. He complained for instance, that "you've all got to sort out you eMax diaries" in failing to complete at the end of the day - he listed everyone, indicating how many they'd failed to complete but failed to mention that I was always

up to date - having previously singled out Alan and Mike for good customer feedback - it's like he's happy to encourage and compliment everyone else but cannot bring himself to do the same for me".

143. It was agreed that Mr Bullock did stop the claimant from bringing his phone into meetings. Mr Bullock said that the claimant did often bring his phone into meetings in the morning and it would ring. Mr Bullock also said that a receptionist told him that the claimant had asked them to call him in the morning meetings and pretend to be a customer so he could avoid the meetings. In his grievance, the claimant referred to the morning meetings in a negative way, saying that "Scott wants to recount his personal life or go over inane issues" and in cross examination the claimant again said that the meetings would go on to inane things. In these circumstances, it was reasonable for Mr Bullock to stop the claimant bringing his phone into meetings.

144. In respect of the allegation that Mr Bullock did not praise the claimant, but did praise other people, again we prefer the evidence of Mr Bullock. He said, "John had good customer skills and there were a number of occasions when I would praise John for doing well". In cross examination, the claimant put to Mr Bullock that he rarely praised him. Mr Bullock said, "I did, said good morning or good night". Mr Bullock also said in cross examination that he did not like the claimant. This much was obvious. Mr Bullock says in his witness statement that "Gary [Phipps] told me that John had it in for me" and he refers to the claimant as "this vile man". It seems likely, therefore, that Mr Bullock found it difficult to praise the claimant and to be civil to him. However, to the extent that Mr Bullock did fail to praise the claimant when he praised other people, we have seen no evidence that this was related to race. The claimant does not say it was in his statement or, more relevantly, in his grievance of 22 September 2016.

145. In our judgment, if there was any failure by Mr Bullock to adequately praise the claimant, this was as a result of their difficult relationship which, in our view, arose because of the claimant's difficult and argumentative nature and Mr Bullock's forthright management style referred to above.

The prep ticket incident – 22 September 2016

146. This concerns an allegation (j) that on 22 September 2016 the claimant was berated in public by Scott Bullock for failing to complete the appropriate paperwork (a preparation ticket) in respect of a new car. Again, the claimant has failed to refer to this allegation in his witness statement. A preparation ticket is a record of what needs to be done, if anything, to a new car before it goes to the customer. It is required to be completed by the sales executive. In this case the car needed mud flaps. The claimant had obtained the price form the Landrover website but recorded the price on the ticket inclusive of VAT rather than exclusive of

VAT. This causes a problem in identifying the amount of money that could be charged to the customer.

147. The claimant does not dispute that he completed the form incorrectly, but takes issue with the way he says he was taken to task in public. The claimant said in the grievance investigation meeting (below) about this issue that he was told off in public by Mr Bullock. Mr Bullock says in the investigation meeting that he cannot remember that specific incident, but it is an issue that occurs often, the implication being with many sales executives. The claimant said that Debbie Lees, one of the administrators who has to deal with the issue, also "joined in" with berating him. In his grievance the claimant described Ms Lees as Mr Bullock's "cohort". He also says that "Debbie hadn't bothered to check the file and Scott used this as an excuse to berate me". In cross examination the claimant maintained that Mr Bullock's actions were discriminatory, but Debbie Lees' were not.

148. We find that on the balance of probabilities, Mr Bullock did berate the claimant in public in front of other staff members. However, this was because the claimant had made a mistake. It is apparent from the contemporaneous complaint that the claimant felt the Debbie Lees was also involved. Mr Bullock says that in fact the complaint about the tickets originated with Ms Lees or other admin staff. In cross examination, however, the claimant sought to deflect blame away from her. In our view, this reflects the fact that the claimant had made a mistake and realised that he had. This was the reason for being criticised.

149. We have commented on Mr Bullock's management style previously, and in our judgment, this is another example of that. This finding reflects that grievance outcome of Mr Roberts of 4 October 2016 (see below). He had a legitimate reason to complain to the claimant but dealt with it in an inappropriate way. The claimant has not provided any evidence to suggest that this was in any way related to the claimant's race, or even that he believed at the time that that was the case. Mr Bullock was subsequently disciplined for the way he spoke to another (white British) sales executive and Debbie Lees, who the claimant said in cross examination was not racist, instigated the complaint against the claimant in this case. On balance, we find that this incident was not related to the claimant's race.

Grievance 2 – 22 September 2016

150. On 22 September 2016, the claimant raised a grievance about the foregoing incidents in an email to Mr Line Hayward. Mr Dan Roberts (HR) had an initial meeting with the claimant on 27 September 2016 and his notes are in the bundle at page 689. Nowhere in the grievance emails or the notes of that meeting does the claimant mention that race might be a factor in the way he says he is treated by Mr Bullock. The claimant says he felt bullied and harassed and that Mr Bullock was out to get him, but he does not say why.

151. The claimant had a formal grievance meeting with Richard Roberts on 4 October 2016. The claimant does not volunteer in that meeting any opinion that Mr Bullock's actions are related to his race. When asked "Is there anything that might make Scott uncomfortable about your relationship?" the claimant said, "No nothing different to anyone else". When asked directly whether the claimant feels he has been racially abused, he says "you get a feeling – but obviously he has expressed certain names". This was not expanded upon, but we note that Mr Bullock is not alleged to have used any racially derogatory terms to or in the presence of the claimant except on 21 March 2016.

152. When challenged about why he had not mentioned race in his grievances, the claimant said that he had raised it before and it had not been dealt with, he didn't have enough proof, he didn't want to mess up his chances in his new job and if he brought up every racist issue he would be making complaints all the time. It is clear, however, that the claimant was not averse to bringing up complaints. We consider it is more likely that the reason that the claimant did not make a complaint of race discrimination in this grievance is because the claimant did not think that Mr Bullock's behaviour towards him was motivated by race.

Roof bars

153. On 26 September 2016, the claimant sold a car to a Mr V. The customer went to the showroom on 1 October 2016 to collect his car but according to the claimant's chronology of events at page 551 dated 6 October 2016, that car had been sold to someone else. There was another car in the showroom that could be given to Mr V, but it had roof bars and a bicycle on it. The claimant was unable to arrange the removal of the roof bars (valued, it is agreed, at around £900) in time for the delivery of the car.

154. In his chronology the claimant said "I was advised that the roof rails, once removed, would leave some gaps in the roof but if we were to put onto another car, we could exchange the parts from one to another. As the replacement showroom car would also (sic) a black HSE discovery sport, we [meaning the claimant and colleagues assisting in the removal of the roof bars] understood it could be transferred. However, if the customer wanted the roof rails. it would not matter…Given the car delivery time was now running late, due to the delay in taking it from the showroom, I also explained the roof rail issue to the customer. Ian and I travelled in convoy to Warwick in order to deliver the new car and upon arrival at the customer's home address, I reiterated to the customer that if he did not want the roof rails, we would remove upon de-badging. I explained I'd email the price and specifications lo him and he could decide to keep or reject…. I was also invited into Scott's office and was accused by Scott of selling a car without charging for the "sports pack" asked what was included and he listed all the items, which I had removed, other than the roof rails (£583.00). What was surprising, was that he noted the bicycle which when Ian and I were taking the car from the show room, it was

Scott who called out from his office to stop trying to drive the car out with the bicycle on top".

155. The claimant does not say that he had been authorised by anyone to deliver the car with the additional roof bars attached. In his witness statement, however, the claimant says "It was agreed with the customer and Mr. Bullock, to deliver the car with the option fitted but after delivery, the customer decided not to retain the roof rack, returning it for removal as agreed." In the disciplinary interview with Mr Beddall on 6 October, the claimant said that he had agreed the arrangement with the roof bars with the customer and told Mr Bullock about it afterwards.

156. In cross examination, the claimant said "Went back to SB and told him the position. Suggestion arose – can't remember who suggested – take to customer. If wants roof bars pay, if not bring back and take off".

157. Mr Bullock does not deal explicitly with this alleged discussion in his witness statement, but in the investigation meeting with Mr Line Hayward he said that he had seen the claimant driving off with the roof bars on and had not realised that they had not been paid for until he looked at the deal file. He says that on his return from delivering the car, the claimant said he had "sorted it". He says that Gary Phipps asked him to investigate the allegation against the claimant about this issue.

158. The account given by Mr Bullock is consistent with the claimant's contemporaneous record. The claimant's contemporaneous account was inconsistent with his evidence before the tribunal. We prefer the account of Mr Bullock as set out in his interview with Mr Line Hayward and find that the claimant decided of his own volition to send the car out with the roof bars on, he had not discussed it with Mr Bullock in advance.

Instruction to use the respondent's email address

159. Around this time, on 5 October 2016, Mr Phipps wrote to the claimant instructing him to stop using the Colliers email and use the new Jardine's email account. There is also correspondence from the respondent's IT department confirming that the claimant's Jardine account was active. Mr Bullock also confirmed in his witness statement that he informed the claimant that he must use the Jardine's email account. This correspondence was very clear that the claimant should only use the respondent's email account when communicating with customers by email.

First disciplinary

160. On 23 September, the respondent received a complaint about the cars the claimant had delivered to the G sisters. On 4 October 2016, the claimant was invited by Andrew Beddall to an investigation meeting about the poor condition of the cars and the allegation that he had sold the car to Mr V without taking payment for the attached roof bars. This relates to

allegation (m). Mr Bullock says, in his witness statement and in the notes of the meeting with Mr Line Hayward that both disciplinary issues were instigated by Mr Phipps. Mr Line Hayward also confirms this in his witness statement. This was not challenged in cross examination by the claimant. Mr Phipps was the Head of Business at the time and it is reasonable that he would have responsibility for these matters.

161. The claimant says, in his witness statement, that that invitation letter came from Mr Bullock. That is self-evidently not correct. Although the claimant agreed in cross examination that the letter was not from Mr Bullock, he then went on to say that Mr Bullock had asked Mr Beddall to investigate to avoid a conflict of interest. This, in our view, is an example of the claimant saying something blatantly and obviously incorrect and then changing his story to fit the facts.

162. We find, therefore, that Mr Phipps decided to commence these disciplinary proceedings in respect of both matters. This is consistent with Mr Phipps' email of 15 September 2016 setting out his displeasure at the way the G sisters' transaction had been handled.

163. The investigation was conducted by Mr Beddall. The claimant set out in an email to Mr Line Hayward dated 6 October 2016 his chronology of events related to the sale of the car to Mr V. Mr Beddall interviewed the claimant on 6 October 2016 and he was invited to a disciplinary hearing on 1 November 2016 before Mr Paul Ivory by way of a letter dated 26 October 2016.

164. There then followed email correspondence between the claimant and Mr Line Hayward. Mr Line Hayward explained that the reason for the delay was that Mr Phipps had left the respondent's employment. The claimant appears to question the motives for the bringing of the disciplinary proceedings but does not refer to his race. On 28 October 2016, the claimant raised, for the first time, the fact that he has not had the reconciliation meetings he was promised after the grievance outcome in July 2016.

165. On 31 October 2016 the claimant sent his defence to the disciplinary proceedings in the form of a lengthy email. In respect of the G sisters, the claimant put the blame fully in the hands of Gary Phipps and Mr Bullock. He says it appears the Mr V case is not being pursued.

166. The disciplinary was heard by Paul Ivory on 1 November. We accept the evidence of Mr Ivory about the reasons he gave for not upholding the disciplinary against the claimant. He couldn't be sure either way who was responsible for the problems with the cars. Mr Phipps had left so they could not investigate whether Mr Phipps was to blame for the issues or the claimant. Mr Line Hayward said the respondent had lost confidence in Mr Phipps so they gave the claimant the benefit of the doubt. It was clear, and we accept, that the claimant was not vindicated or exonerated

but that the respondent wanted him to learn from the issues and move on.

167. The claimant took great exception to the existence of two versions of the disciplinary outcome letters. One referred to *a disciplinary hearing*, said the allegations were not proven and that if similar matters happen again action will be taken; the second referred to *discussions* and said the allegations were not accurate so "I will not be moving towards a disciplinary hearing".

168. The production of the second letter was as a result of the claimant writing to Mr Line Hayward on 7 November 2016 asking him to change the letter and expunge any paperwork relating to that from his records. In the claimant's view, there was no disciplinary hearing and the disciplinary hearing was "void ab initio". Mr Line Hayward said in his witness statement that he reluctantly agreed as the allegation had not been well founded.

169. We find that there was a disciplinary hearing and the findings of that hearing are as set out at page 621. That the respondent changed the letter does not impact on the fact that the claimant attended a disciplinary meeting to answer disciplinary allegations. The claimant's assertion that Mr Ivory was a liar in producing the first letter is plainly wrong. The second letter was, as Mr Ivory says, an attempt to move on only three months after the TUPE transfer.

170. Finally, in respect of this issue we consider that it was reasonable of the respondent to have retained a copy of the original unamended letter and the claimant's arguments about this were wholly misconceived.

171. On the morning of 1 November 2016 at 6.05am, the claimant submitted a third grievance to Mr Line Hayward. He raised a number of issues about which we do not need to comment here but which are dealt with in the grievance outcome of 22 November 2016 (below).

Holiday carry forward

172. We refer to allegation (n) which is that on 1 November Mr Bullock attempted to stop the claimant carrying forward holiday for the Christmas 2015 period.

173. The claimant does not mention this in his witness statement. Mr Bullock says he has no idea what this refers to. In cross examination the claimant said that Mr Bullock had told him at the time that he couldn't remember anything about carrying forward time off. The claimant said he wrote to Mr Line Hayward, who spoke to Mr Phipps and then the claimant had the time off.

174. We accept that this happened. We heard nothing to suggest that Mr Bullock had done anything other than forget a conversation from a year

previously. The issue, such as it was, was resolved. To the extent that it was a negative act by Mr Bullock towards the claimant (and we do not accept that it was anything other than genuinely forgetting a conversation) it was not connected with the claimant's race.

Grievance outcome

175. On 22 November 2016, Mr Richard Roberts wrote to the claimant with his grievance outcome from the second grievance and which included the third grievance he had raised on 1 November 2016. In his witness statement, Mr Roberts summarised the grievance outcome to the effect that the claimant was being judged for things he did not agree with and Mr Bullock was becoming frustrated with the claimant. In respect of the claimant's allegations about Mr Bullock Mr Roberts said, in the grievance outcome letter, "I think we have identified there is a concern but rather than it being solely directed at you I have found there is an overall concern with management style and practises which will be addressed". This is consistent with some of the claimant's earlier grievances in which he said that Mr Bullock's behaviour was directed at many people.

176. Mr Roberts went on to say that there is a breakdown of the relationship between the claimant and Mr Bullock and his concerns have been investigated. Mr Roberts noted that both parties had agreed to mediation and this was the best way forward.

177. We find that this was a reasonable and reasoned outcome based on the evidence before Mr Roberts.

178. Shortly after that, Mr Bullock received a disciplinary sanction in the form of a final written warning for

    a. Improper behaviour or outright rudeness in the presence of visitors, customers, the general public or other members of staff.
    b. Bullying, harassment and abusive language.
    c. Dishonesty.

179. This was not in respect of Mr Bullock's behaviour towards the claimant, but towards James Irvine. Although not determinative of any issue, we note that James Irvine is said to be white. The incident was one in which Mr Bullock berated a colleague in public. This outcome, and the evidence in support of it, supports our conclusion that any inappropriate behaviour Mr Bullock directed towards the claimant was because of his management style and general demeanour. It was not related to the claimant's race.

FDA

180. The final allegation in 2016 is allegation (o) – that on 29 November 2016 Mr Bullock attempted to blame the claimant for failing to provide FDA

support to Dr G. FDA support is a financial incentive from the car manufacturer to allow cars to be discounted.

181. The claimant, again, did not mention this allegation in his witness statement. It is set out in a two-page email dated 29 November 2016 to Mr Line Hayward. The claimant's account set out in that email is that the claimant agreed to sell the car to Dr G including a discount financed by the FDA. When it came to completing the paperwork, it transpired that no FDA support was available from the manufacturer because it was a special edition car. The claimant asked Mr Bullock about it and he said he knew there was no FDA support for that car and the claimant should have known too. When the claimant asked what to do, Mr Bullock said there would need to be an investigation. Then the respondent provided the full discount at its own cost.

182. The claimant's complaint is that Mr Bullock blamed him for this mistake. In the complaint to Mr Line Hayward, he says that Mr Bullock should have picked up on this earlier in the sales process when signing off paperwork. The claimant agreed at the time and in the hearing that he had made a mistake. No action was taken and there was no investigation. We note, however, that this mistake cost the respondent in the region of £2000.

183. Mr Bullock interpreted the allegation as him failing to provide FDA support and explains that FDA support is not available from the manufacturer for that car and every member of the team knew that. This reflects the fact that the allegation does not reflect the complaint as set out in the email to Mr Line Hayward. It was clear, in cross examination, that the claimant had not read the allegations he was making.

184. The claimant did not question Mr Bullock about this.

185. To put it simply, we do not understand this allegation. The claimant admitted a mistake, Mr Bullock said it would need to be investigated, it was not, nothing happened. Mr Bullock, in our view and on the claimant's version of events set out in his email, acted reasonably.

Mediation

186. We consider now allegation (k) – failing to arrange a reconciliation meeting between approximately May 2016 and April 2017. This refers to mediation between the claimant and Mr Bullock.

187. The first mediation recommendation was made on or around 23 May 2016 by David Clarke of Colliers after the claimant's first grievance. In his email of 26 May 206 (page 477) the claimant seeks to appeal against the grievance outcome to Jardines, thereby, in our view, rejecting the offer of mediation.

188. It was agreed that one of the outcomes of that appeal would be mediation (or reconciliation) between the claimant and Mr Bullock to be facilitated

by Gary Phipps. The first time that the claimant was prepared to engage in mediation was from 22 July 2016.

189. In cross examination, the claimant said he reminded the respondent on up to 10 occasions out the mediation. He was unable to identify those occasions, and had not set them out in his witness statement, so he was given permission to bring in the page references the next day.

190. The next day, the claimant attended with what turned out to be a list of references. When the claimant returned to the witness stand he had a piece of paper with him. The claimant was unclear or confused about what was on the paper – whether it was the list of page references, notes from the previous days questioning, notes to help him answer questions or something else. In any event, eventually he was able to provide a list of occasions when he said he had chased the respondent about the mediation.

191. The claimant referred to the instances below.
    a. In his meeting with Dan Roberts on 27 9 16. There is no reference to the claimant raising this in either Dan Roberts' notes of the meeting at page 689 or in Dan Roberts' internal email page 676. Both of those documents record other contentious issues raised by the claimant so we consider it likely that had the claimant raised it Mr Dan Roberts would have recorded it;
    b. An email dated 5 October 2016 at 9.38 pm. We were not taken to a copy of this email in the bundle;
    c. An email dated 28/10/16 at 11.09 (page 593) in which the claimant said "I've never had a reconciliation meeting which you stated would happen, even though some 4 months has elapsed since the complaint was dealt with". Mr Line Hayward replied at 11.42 and said "I apologise that you didn't receive your reconciliation meeting that Gary Phipps agreed to facilitate. I am unable to determine why this did not happen with Gary no longer in the business but I am happy to media (sic) this if you still wish to proceed and believe it would help."
    d. The claimant referred to a further email on 28 October 12.04pm (page 588) which is a continuation of the conversation. The claimant said "With regard to the reconciliation meeting with Gary Phipps in the chair, you are patently aware that he abrogated all responsibility regarding these issues due to his personal involvement and incumbent conflict of interest!" We find that this was not an instance of the claimant chasing up mediation. In fact, he declined to respond to the offer of Mr Line Hayward to arrange the mediation.

192. We refer again to the grievance outcome letter of 22 November 2016. In that outcome, Richard Roberts said "I note that both you and Scott have agreed to mediation to enable a more harmonious working relationship".

193. On 2 December 2016 the claimant sent an email at 09.05 to Mr Line Hayward (page 744) in which he asks if there is to be a reconciliation

meeting. After that email, Mr Dan Roberts arranged a mediation meeting for 12 December 2016 with him, the claimant, Mr Bullock and Richard Clough. The claimant agreed that this meeting was postponed because Mr Dan Roberts was unwell and Richard Clough had a family emergency on 12 December. The claimant agreed that this was a reasonable reason for delaying the meeting. Mr Dan Roberts said in his email that he would try to rearrange the meeting for the same week and the claimant agreed that this showed that the respondent was motivated to arrange the meeting.

194. Soon after that it was Christmas and then the claimant was off sick from 3 – 30 Jan 2017. Mr Line Hayward said that when he approached the claimant to try to rearrange the reconciliation on his return to work in 2017, the claimant said he was unable to attend due to his voice issues. The claimant said he did not recall that conversation, but did not dispute it. We accept Mr Line Hayward's evidence on this point.

195. It is clear, in our view, from this chronology that it was Gary Phipps who was responsible for initially setting up the mediation after July 2016 and who failed to do so. When the claimant did raise it with Mr Line Hayward, after Mr Phipps had left the respondent, Mr Line Hayward took steps to arrange it. The only reasons it did not happen quickly after the claimant raised it on 28 October 2016 was because initially, the claimant did not respond to the offer to arrange it, then due to the unforeseen personal circumstances of Mr Dan Roberts and Mr Clough and finally because of the claimant's ill health. We note that the claimant did not in fact raise the issue of mediation until after he received the grievance outcome letter dated 22 November 2016. This tends to suggest that in fact it was the respondent who was pushing for the mediation, not the claimant.

196. The claimant has not produced or pointed to any evidence to suggest that any of these circumstances were connected to the claimant's race and we find that they are not. We also refer to the close relationship the claimant said he had with Mr Phipps. It is difficult to think of any reason why he could not have raised this issue directly with Mr Phipps between July 2016 and Mr Phipps leaving. In respect of the claimant's points that Mr Phipps was conflicted from dealing with the mediation, this is irrelevant. It did not stop the claimant asking Mr Phipps what was happening or Mr Phipps arranging for someone else to conduct the mediation.

197. Once again, the claimant brought little or no direct evidence about the allegation, he exaggerated his case substantially – saying he raised the issue up to 10 times when in fact we were shown two occasions after the July grievance outcome, one of which resulted in an offer to arrange it that the claimant ignored – and the claimant introduced needlessly technical legal concepts, in this particular instance an alleged conflict of interest.

Sickness absence

198. The claimant was off sick from 3 January 2017 until 30 January 2017 with a chest infection. This caused the claimant to have issues with his voice. The claimant provided a fit note dated 30 January 2017 certifying him fit for work and making the following recommendations: that the claimant was prone to loss of voice on exposure to cold air and reducing his working hours to six per day was desirable. A phased return plan was implemented. There was a disagreement as to whether the respondent had agreed to pay full pay during the claimant's phased return. The claimant was paid full pay during his sickness absence and for the first two weeks of his phased return.

199. The claimant met with Mr Clough on 13 February 2017 to discuss his phased return. Mr Clough told the claimant that he would be paid pro rata for the work he did during his phased return. The claimant was unhappy with this and raised it with Mr Line Hayward, saying that Mr Beddall had authorised it. It is clear that the claimant was concerned about his income, as he asked for either average pay or a loan to see him through. The claimant says that Mr Clough agreed that the claimant could come in 30 minutes later than usual and leave 30 minutes earlier but was required to work through his lunch. The respondent's witnesses (Mr Line Hayward, Amberley Wood and David Koulakis) all agreed that the claimant was working these hours between February and August 2017. However, they all also said that this would have been the claimant's choice. Mr Clough simply denies that he forced the claimant to work through lunch. Ms Wood says that in the August, she asked the claimant to revert to his normal working hours, suggesting that he rest his voice at the start and end of the working day and Ms Wood also refers to an email chain on 9 March 2017 (page 784) between HR officers in which it is clear that the reason the claimant was working through his lunch was to increase his income.

200. On balance, we find that the claimant was not required to work through his lunch. In our view, this was the claimant's own decision and it was driven by a wish to increase his income – whether by working longer hours or increasing his commission - in light of the respondent's decision to pay sick pay or pro rata pay. It was reasonable for the respondent to pay pro rata, and it was reasonable for the claimant to want to earn more money but the decision to work through without taking a break was the claimant's.

201. On his return to work, the claimant's line management was transferred to Mr Beddall as a result of the breakdown in the relationship between the claimant and Mr Bullock. The claimant confirms in his witness statement that he had little contact with Mr Bullock from then. The claimant refers to an incident when he requested time off in March to attend a university open day with his daughter and Mr Bullock delayed in responding so that he missed it. This was not relied on as in incident of discrimination. The claimant does refer to it obliquely in his "Detailed Chronology and

Allegations" although he says it was on 4 April 2017. Mr Bullock does not refer to it in his witness statement and said he could not remember it in cross examination.

202. In so far as this is relied on as evidence of Mr Bullock's general discriminatory behaviour towards the claimant, the claimant has not shown that, if this happened, it was in any way related to his race.

203. Mr Bullock left the respondent's employment on 1 April 2017 and it appears that the claimant's line management then transferred to Aaron Silcock.

The third grievance

204. On 29 April 2017, the claimant raised a further grievance with Mr Line Hayward. On Friday 28 April, the claimant received an email saying that the May Bank Holiday opening times on the following Monday were changed from 10 – 4 to 8 – 6. In that grievance the claimant referred to this being a fundamental change and in breach of terms and conditions; there may be working time regulations issues and that he should be remunerated for the extra working hours. Mr Line Hayward replied on 3 May 2017 including confirmation that additional remuneration is not paid for bank holidays. The claimant responded on 6 May, reiterating the late notice and lack of consultation and asking for his complaint to be reconsidered. We note that the claimant refers in that email (erroneously in the context) to the "officious bystander test."

205. On 10 May Mr Line Hayward responded to suggest a meeting to discuss the matter rather than the continual sending of lengthy emails. It appears that there was no reply to this offer but the claimant sent a without prejudice email to the respondent on 7 June 2017, the details of which were redacted, but referring to unilateral alteration of a contract.

206. The respondent agreed, on 14 June 2017 to pay the claimant for the additional hours he worked on that bank holiday. Mr Line Hayward said in cross examination that that payment was made only to the claimant as a gesture of good will in recognition of the fact that the respondent gave little notice to the change. Despite the legalistic and aggressive way in which the complaint was raised, the respondent responded appropriately to it, considered it fairly and produced a reasonable outcome.

Medical records

207. Meanwhile, the claimant was continuing to work altered hours. On 2 May 2017, the respondent requested that the claimant consent to his GP providing a medical report to enable them to understand the claimant's condition and the support they could offer. The clamant did not, at that point, provide that consent. When asked why in cross examination, he said he hoped he would get better, it wasn't necessary, he was uncomfortable with people asking about his medical condition and he had

provided the respondent with GP Fit Notes and information from the hospital. The information he referred to was appointment letters and exercise information sheets as the claimant sets out in his witness statement. There was no detailed or specific information relating to the impact of any condition on the claiamnt.

208. The GP fit note after this request, dated 2 June 2016, continued to advise that the claimant work amended hours until 2 July 2016. In our judgment, it was reasonable for the respondent to request further information from the claimant's GP. The information the claimant referred to was insufficient for the respondent to decide whether it was appropriate for him to continue working amended hours.

Jamie Roberts disciplinary

209. The next issue in the list of allegations of discrimination is allegation (p). This is that on 5 June 2017, the management at the dealership including Mr Duncan, Mr Clough, and members of the HR department discriminated against the claimant by taking disciplinary action against him in respect of his failure to take or delay in taking payment from a customer – Mr J R.

210. In respect of this allegation, the claimant identifies a specific comparator – Mr C Jones.

211. It appears to have come to Mr Silcock's attention on around 5 June that the claimant had let a car go to a customer without taking full payment. Mr Silcock then sent an email to the claimant inviting him, the claimant says, for a catch up. In fact, the whole of the email says "Can we please have a catch up so I can understand what went wrong re Mr R reference the £500". (Page 1069)

212. The claimant had released the car to Mr R without taking full payment - £500 was outstanding. The claimant said it was because the card payment machine was not working. Mr R did pay the outstanding balance sometime later – a week or so – after the claimant had chased him up a number of times.

213. The claimant spent a long time discussing an issue relating to the way that this matter was investigated, and specifically in relation to the email from Mr Silcock inviting the claimant to a "catch up". The claimant's view was that he should have been sent a formal invitation to an investigation meeting, been given more notice of the meeting and been informed of his right to be accompanied. These things obviously did not happen – Mr Silcock sent a brief email on 5 June 2016 at 18.35 for a meeting with the claimant.

214. In the event, Mr Silcock met the claimant nine days later, on 14 June 2016 at 1.50pm. The claimant says in his witness statement that he was given only one minute's notice of this meeting and was not informed that

it was an investigation meeting. We accept this evidence – it is consistent with the correspondence with HR about that meeting around the same time.

215. There are notes of that meeting in the bundle and it is apparent that the claimant was not informed that he was entitled to have a companion with him during that meeting.

216. The purpose of the meeting was explained – to discuss the failure by the claimant to take £500 from the customer. The claimant did not dispute that he had failed to take the £500 but said that the card machine was not working and it was the practice under previous managers (who had left by then) that payment could be taken later in those circumstances. He said he thought there were no managers in to ask on that day so he, effectively, took the decision to allow the customer to pay the next day. He confirmed that the customer paid some days later.

217. We find that this clearly was an investigatory meeting. We were taken to the respondent's disciplinary policy and the claimant agreed that the policy did not specify anything requiring particular notice for an investigatory meeting. He said that the process was in breach of the policy because the policy was said to be in compliance with the ACAS Code of Practice. In fact, the policy says that the Code *applies* to the policy but that it is not a legal requirement to follow the Code, although Jo Newell states in an email to the claimant on 16 August 2017 that the respondent's policy does comply with the Code. We were not referred to any specific parts of the ACAS Code with which the respondent's policy was said to be non-compliant. We note that the Code does not require any particular notice or procedure for investigatory meetings, or even that there will necessarily be one. It does not refer to the right to be accompanied at an investigation, although it does say that a policy may allow that. The ACAS guide (not the Code) does say that "If a meeting is held, give the employee advance warning and time to prepare". However, it also says "The nature and extent of the investigations will depend on the seriousness of the matter…"

218. The claimant's assertions that the respondent was acting in breach of the ACAS code in the way in which this was investigated are wrong. The claimant was given inadequate notice of the investigatory meeting, but he had known that there was an issue since 5 June and the meeting was not until 14 June. He therefore had plenty of time to think about what had happened. We cannot identify any prejudice to which the claimant was subject by the way in which this investigation was conducted.

219. Mr Silcock then interviewed two other sales executives who each confirmed that it was not permitted under previous managers to allow cars to go out without taking full payment.

220. The claimant was notified by Mr Silcock in a letter dated 12 July but sent attached to an email on 11 July 2017 inviting him to a disciplinary hearing

on 13 July 2017 at 5pm. The claimant was informed of his right to bring a colleague or Trade Union representative in that letter. At the claimant's request, the disciplinary hearing was moved to 18 July 2017 as he said he did not have enough time to prepare.

221. The claimant did, however, have time to write two lengthy grievance letters about the disciplinary. The first one, dated 12 July 2017, ran to 3 ½ pages and dealt with, amongst other things, the following matters:

    a. Alleging a failure to follow the statutory grievance procedure under the Employment Act 2002
    b. Alleging a failure to follow the ACAS guidelines including:
        i. that there was an undue delay between the incident on 31 May and the disciplinary hearing on 14 July (sic)
        ii. That the claimant was not formally invited to the investigation meeting and not told of the right to be accompanied
    c. Alleging breaches of the ACAS code, including references to the Trade Union and Labour Relations (Consolidation) Act 1992.
    d. Alleging that the definitions of Gross Misconduct in the respondent's polices are "unreasonable and inherently unsafe". The claimant referred to the fact that he had "dealt with hundreds of Employment Tribunal cases over a 20 year legal career" (despite regularly claiming to be unfamiliar with the tribunal process throughout the tribunal hearing and being a solicitor for 16 years as at the date of the Disciplinary Tribunal where he was struck off).
    e. Dealing with specific issues relating to the disciplinary allegation against him including that there was no material loss, the sum involved was small and that he had never had a copy of the 2017 Disciplinary Policy or a Contract of Employment
    f. Requesting that the disciplinary proceedings be "stayed" pending the claimant being able to take legal advice.

222. The letter was also CC'd to "Mr A Rai – Barrister-at-Law". In our view, this letter was written in such a way as to deliberately confuse and intimidate the respondent.

223. Amberley Wood replied on 12 July and said that the matters raised would be dealt with at the disciplinary hearing and it would not be further postponed. This was an appropriate response. The matters referred to were clearly directly related to the disciplinary allegations against the claimant. During this period the claimant was regularly and frequently contacting Mr Line Hayward by email and text.

224. On 13 July Joanna Newell sent an email to the claimant asking him to refrain from sending "legally charged letters" to HR and pointing out that
    a. He refused to sign the company handbooks and contract of employment
    b. He failed to sign the procedure for completing his work to the standards expected, which forms part of the divisional commission

scheme and achievement would then result in commission payments being made

c. He failed to sign any medical consent form to give them any insight into his medical condition

225. The reference to the divisional commission scheme is a reference to an amended "Definition of Sale" that was given initially to the claimant on 8 June 2017. This sets out the conditions that must be met for a sales executive to be paid commission on a sale.

226. On 14 July the claimant sent a second 3-page letter about his grievance. This letter is peppered throughout with inaccurate and misleading references to the law. He says that the process is in breach of the long since repealed sections 29 and 31 Employment Act 2002 and that the procedure is "void ab initio". The claimant refers again to his 20-year legal career, solicitors and the need to instruct counsel. This letter is also, in our view, designed to confuse and intimidate the respondent.

227. We were not shown anything in any of these emails, texts or letters from the claimant suggesting that he believed at that time that the disciplinary procedure was in any way related to the claimant's race. Ms Wood told the claimant that the matters raised in his grievance would be heard at the disciplinary meeting. Ms Wood expresses the view that the grievance was an attempt to delay matters and we agree. The matters set out in the claimant's grievances of 12 and 14 July were clearly related to the ongoing disciplinary proceedings and it was appropriate for the issues raised to be considered in the disciplinary proceedings.

228. The claimant continued to correspond with the respondent through Mr Line Hayward and sent a copy of what he said was an email from a former colleague, Mat Irving, dated 14 July 2017. This email says "In view of the size of balance and talking to the customer, I authorised for the car to be released and payment to be taken the following day. Regards Mat". The claimant asked for the disciplinary proceedings to be dropped on the basis of this email. The respondent did not accept the email at face value, Mr Irving having "left under a cloud" and it was appropriate for this evidence to be considered at the disciplinary hearing.

229. The disciplinary allegations were heard on 18 July 2017 by Richard Clough. The claimant says, in his witness statement "Richard Clough, who refused to allow the Grievance to be heard, vital documents were missing, committed innumerable procedural breaches, etcetera."

230. It is correct that the claimant was told that he would not be allowed to air his grievances at that meeting – Mr Clough said that he would not listen to anything regarding additional grievances. However, it appears that in the event the claimant was able to say everything that he wanted to. It is also correct that Ian Simmonds, who was accompanying the claimant, was told that he was there as a witness and would not be able to make any comments.

231. In the course of the hearing, the claimant also alleged that he did not have a contract (of employment), although he agreed in the disciplinary hearing that he had been given a contract but had refused to sign it. He said, in the disciplinary hearing, that the start date was wrong and that "lots of other bits an pieces were wrong" so he refused to sign it. The claimant referred to the "TUPE regulations". We note, however, that in cross examination the claimant was adamant that he had not read past the first page of the contract he was sent.

232. The claimant also says, in his witness statement, that

    a. The case was initiated by Mr (Owen) Duncan, after a failed blackmail attempt
    b. The investigation process was flawed (as above)
    c. That Mr Clough was unprepared (in that he had forgotten in the hearing the name of the customer involved in the transaction)
    d. That the respondent had "failed to prove" that the email from Mr Irving was "illegitimate and irrelevant"
    e. That the allegation should not have been gross misconduct as there was no actual loss to the company
    f. That the respondent had failed to prove that the claimant had "read, understood & agreed to the Company terms, conditions, disciplinary policies and procedures."
    g. That Mr Clough introduced new evidence which the claimant had not seen prior to the hearing.

233. However, the claimant agreed in cross examination that the car had gone out without full payment and Ms Wood said, in her witness statement, that it is a basic principle not to release a car without full payment.

234. The outcome of the disciplinary was given to the claimant at a meeting on 19 July 2017. The allegation of gross misconduct was proven but the outcome was lessened to a level three warning.

235. In our judgment this was a reasonable outcome. We agree that there were some procedural faults with the disciplinary process – the claimant's representative was not allowed to participate and there could have been more notice of the investigation meeting. It is clear from the transcript that the claimant did, despite Mr Clough's statement, have the chance to raise the matters set out in his grievance at the conclusion of the hearing in so far as they were relevant. The claimant was not substantially prejudiced by any of these matters.

236. We are not surprised that Mr Clough appeared at some points confused by the process and forgot the name of the customer concerned. It is clear from the transcript that the claimant approached the disciplinary hearing in the same way that he approached the hearing before the Tribunal. He sought to introduce numerous confusing technicalities and irrelevant

matters. That certainly does not, in our view, indicate that Mr Clough was not adequately prepared for the hearing.

237. In respect of the specific allegation that the disciplinary process was related to the claimant's race – we have seen and heard nothing to suggest that that was the case. The claimant refers to Mr Duncan but it is clear that the disciplinary investigation was initiated by Mr Silcock, the claimant's then line manager. In cross examination, the reasons the claimant gave for considering that his race was a factor in pursuing this matter were that (a) despite the claimant pointing out the clear breaches in procedure, the respondent continued with the process; and (b) that Chris Jones was treated differently in a similar matter.

238. In respect of (a), we find that the reason the process was continued was that the procedural flaws the claimant raised were either wrong, or minor and that in the circumstances it was correct that the purported evidence from Mat Irving be considered at a hearing. The claimant's assertion that the respondent should just withdraw the disciplinary allegations on the basis of the claimant's complaints about procedural breaches is misconceived and displays a high level of arrogance.

239. In respect of (b), the circumstances relating to Chris Jones are set out in the statement of Ms Wood. She says:

> "Mr S is a long-standing customer who bought a Land Rover Discovery by trading in his old car and funding the balance through car finance on 1 March 2018. … On 1 March, Chris had cleared funds, the paperwork with the finance company was in place and the deal was checked and signed off by his manager, Andrew Passey, before the car was released. .... John is alleging that Chris breached core sales process by not completing an order form at the time that the deal was agreed, in mid December 2017. This is not correct. The reason there was no order form completed at the time that the deal was agreed was because I understand that this car was replacing a car that the dealership had previously sold to him which had been faulty and this new car was to replace the faulty one so it was not a standard sale".

240. The claimant sought to argue that by failing to obtain the customer's signature on the order form, Mr Jones had put the respondent at risk of a loss of £70,000 on the basis that the customer was not contractually bound to but the car that the respondent had ordered from the factory. In cross examination the claimant said if the customer did not sign the order form, he was not contractually bound to buy the car. The claimant's case was that both the failure to take full payment for a car and failing to obtain a customer's signature on an order form were breaches of the core sales process so were comparable.

241. Mr Delo sets out the four requirements of the Core Process as follows:

    a. The car must have been sold

b. It must have been paid for in full
c. The car must have been delivered
d. The sales executive must have compliant documentation and a completed deal form.

242. In his witness statement, the claimant said that without the signed order form, "the customer is not legally bound to purchase a car. The Respondent has failed to disclose any evidence to prove that Chris Jones complied with the basic first step of the Sales Core Process".

243. It was unclear from the evidence we heard whether the order form comprised a contractual document and to what extent the customer failing to sign one would put the respondent at risk. It was certainly not a commonly held belief by the respondent's witnesses that a failure of a customer to sign an order form would put the respondent at risk of the customer walking away from the purchase of a car.

244. Ms Newel said that in this case no order form was required because the car was replacing a faulty car that the dealership had previously sold to him which had been faulty, so it was not a standard sale. Ms Newell confirmed that she had no direct knowledge of this transaction. Mr Delo, however, confirmed that an order form would always be necessary and agreed that the order form formed a contract under which the customer was bound to buy and the company was bound to sell a new car and that he would not order a new car unless he got an order form. Mr Delo clearly has a great deal of experience in car sales.

245. However, it is clear in our view that while ordering a car without a written contract of sale may expose the respondent to some risk (if the order form was in fact a contract to sell) if the customer changes their mind, this is a wholly different proposition to giving a car to a customer without taking full payment for it. There is a clear commercial difference. As Mr Clough says in the disciplinary hearing, the claimant was not permitted to part with possession of the car on behalf of the respondent without full payment being taken. In our view the circumstances of Chris Jones and the claimant were not comparable.

Change to the definition of sale and contractual changes

246. In the meantime, on 8 June 2017 the respondent sought to change the commission scheme and update the "definition of sale" from 1 May 2017. This is the set of conditions that must be met before a sales executive can be paid commission on the sale of a car. The claimant wrote a complaint the same day on behalf of a number of the sales executives about the way this was implemented. Again, this letter is written in a legalistic manner and included references to employment case law.

247. The specific complaints were that the change was sought to be applied retrospectively and some aspects of the specific requirements were unreasonable due to technological issues and lack of training. Mr Line

Hayward responded to the people who were party to the letter offering to discuss their particular complaints. The issues were resolve for the majority of employees by providing training. The claimant was also booked onto training on 5 July 2017 but did not attend, although he had attended previous training.

248. The claimant alleges that Owen Duncan, the then Head of Business, said to the claimant on 13 June 2017 that, effectively, if he pursued this complaint, the disciplinary would go badly for him. The claimant relies on a contemporaneous note of the conversation on his iPad. Mr Duncan did not give evidence and we are prepared to accept that there was a conversation to this effect – although the precise terms are unclear and the claimant's notes do not exactly accord with his subsequent evidence. We find, however, that any such conversation was motivated by the fact that the claimant was causing a problem for the respondent by raising this issue. It was wholly unrelated to the claimant's race. The claimant said, in cross examination "When I sent letter, complete change in attitude towards me". The claimant said that his treatment in the meeting the next day by Mr Duncan was evidence of racial discrimination – Mr Duncan was picking on him rather than any of the other people in the room. In our view, this is the same issue – on the balance of probabilities any such acts by Mr Duncan were motivated by the letter, not related to the claimant's race.

249. We also note that the claimant's note of his conversation with Mr Duncan includes a reference to him being struck off as a solicitor and it was at this point that Mr Line hayward obtained a copy of the Solicitors' Disciplinary Tribunal Judgment.

250. The claimant continued to argue for changes to the Definition of Sale. At this point, the claimant continued to be working amended hours. On 13 July 2017, Ms Newell wrote to the claimant which include the following:

"We are at a loss as to how to proceed with your employment based on the below:

- You refuse to sign the company handbooks and contract of employment
- You fail to sign the procedure for completing your work to the standards expected, which forms part of the divisional commission scheme and achievement would then result in commission payments being made
- You fail to sign any medical consent form to give us any insight into your medical condition"

251. The options the respondent had identified for moving forward were:

- Withdraw any commission payments due to him not signing the agreement to receive these payments.
- Going through a formal consultation, termination and re-engagement on the new terms.

- Considering the claimant's fitness for work and adjusted hours without any medical advice.

252. The claimant considered that this was a threat. In our view, these were the only options open to the respondent. The claimant had by this time shown himself to be unreasonable and unreasonably argumentative. This email was reasonable.

253. The claimant's contract of employment (with amended start date), company handbook and amended definition of Sale were sent to the claimant on or shortly after 17 July 2017. The claimant signed and returned them, along with the medical consent letter, on 1 August 2017. We note that the grievance and disciplinary policies are explicitly stated to be non-contractual and we have not seen or heard any evidence to suggest the contrary.

254. The respondent wrote to the claimant's GP on 2 August 2017 for further information about the claimant's medical condition. In a telephone conversation on 7 August 2017 with Ms B Beckham, the claimant's GP refused to write a report and is recorded as suggesting that the respondent get an occupational health report.

Disciplinary appeal

255. On 24 July 2017, the claimant appealed against the disciplinary outcome. We note that again the lengthy correspondence from the claimant is dense, confusing and includes numerous legal references. The claimant alleges a number of procedural breaches, including a delay in sending out the disciplinary decision letter. The claimant was told that his appeal was required to be submitted by 26 July 2016 but as the disciplinary decision did not arrive within the time set out in the respondent's policy he had no choice but to submit his appeal on 14 July before receiving the written outcome on 26 July. The claimant says this means that the respondent had the chance to alter its decision to accommodate the claimant's complaints.

256. The claimant had, however, already been given the outcome verbally on 19 July 2016 and he fails to explain in what way the findings had been altered. We prefer the evidence of Ms Wood that the delay was, effectively, just a result of administrative issues.

Email investigation

257. On 3 August 2017, David Koulakis, the then temporary General Sales Manager, conducted an investigation meeting with the claimant into a concern that had been brought to his attention that the claimant was using his personal emails to contact customers. The fact and the content of the meeting is broadly agreed. The claimant raises an issue that he was not given adequate notice of the meeting, not given time to prepare and not allowed to bring a witness. It is not disputed that the claimant was

given very little notice of the meeting and we find that he was not given written notice. However, there is no requirement to do so either in the respondent's policy or under the ACAS Code. The claimant appears, in his witness statement, to confuse an investigatory meeting with a disciplinary hearing which this clearly was not. Mr Koulakis said that he gave the claimant the option to bring a colleague and that was not challenged. This is consistent with the advice Mr Koulakis received from HR and we find that the claimant was given this chance.

258. Although Mr Koulakis was unable to provide the details of the specific customer that the claimant had contacted, the claimant confirmed that he contacted customers from his personal email account, but that he only did so with the permission of those customers. The claimant said he had received a copy of the respondent's data protection policy but had not at that time read it.

259. Mr Koulakis and the claimant then went on in the meeting to discuss the fact that the claimant was continuing to work amended hours and asked him to resume his normal hours but with voice rest at the start and end of the day. Mr Koulakis said he would discuss the claimant's comments with HR and then get back to the claimant.

Appeal meeting

260. The appeal against the first disciplinary was heard by Hayley Keatinge at a meeting on 7 August 2017. The claimant was not accompanied at that meeting but confirmed that he was content with that.

261. It is clear that the claimant was given the opportunity to discuss all the matters he wished to raise at the appeal hearing. In his witness statement, the claimant raises a number of issues about the appeal – that Ms Keatinge's initial view was that the punishment was too harsh and the claimant was working in an environment with no process and the disciplinary process was flawed; that her decision was influenced by HR and that Ms Keatinge conducted further investigations between seeing the claimant and issuing her decision without giving the claimant an opportunity to comment.

262. The claimant does not say that Ms Keatkinge's decision was related to his race and nor does he raise in the appeal that the disciplinary process was in any way related to his race. In cross examination, the claimant raised the following issues with Ms Keatinge:

    a. An appeals officer should be more senior, and Ms Keatinge was not
    b. Ms Keatinge did not listen to the recording of the disciplinary meeting
    c. Not all documents were provided to Ms Keatinge
    d. HR drafted the appeal outcome letter,
    e. Issues relating to the notice of the investigation meeting
    f. That the claimant had not done core sales training,

g. That his colleague had been prevented from speaking at the disciplinary hearing

263. It is clear and we find that Ms Keatinge did conduct further enquiries after the meeting and did not allow the claimant to comment on them. Ms Keatinge was of the same level in the organisation as Mr Clough. It is also correct that HR drafted the outcome letter. However, we accept Ms Keatinge's evidence the she reviewed the letter before it was sent and was happy with the content. Ms Keatinge confirmed that her initial view was that there were some issues but having discussed it with HR and made further enquiries, she was satisfied that the outcome and sanction was fair.

264. There were flaws with both the disciplinary and appeal process. Particularly, it would have been preferable had the claimant had the opportunity to comment on Ms Keatinge's further investigations. It is not the case that an appeal officer is necessarily required to be more senior than the disciplinary officer. However, Ms Keatinge is of the view "Despite John's efforts to confuse matters, I saw this to be a clear black and white situation. John had released the car without full payment and had admitted that he had done it. That was a clear breach of company policy". Ms Keatinge sent the outcome letter on 23 August 2016 upholding the disciplinary decision. In our view, despite the procedural flaws, the outcome is reasonable.

Meetings 14 August 2017

265. On 14 August 2017, the claimant was asked to attend a second investigatory meeting with Mr Koulakis into the email allegations. Mr Koulakis sent an email to the claimant at 10.02am inviting him to two meetings the same day at 10.30am and 11am. This email explained what the meeting was about and informed the claimant that he was entitled to bring a colleague. The first meeting was about the claimant's medical condition, the second a continuation of the email investigation. There was a delay to the start of the meetings as the claimant said he did not receive the email originally and the meeting was put back to 11am. The claimant had sufficient notice of this meeting.

266. Mr Koulakis asked about the claimant's medical condition, explained that the claimant's GP had refused to provide a report and asked the claimant to consent to an occupational health assessment as the GP had recommended. The claimant did not sign the form there and then but instead said he would need to discuss this with his GP.

267. The second part of the meeting continued the email investigation. Mr Koulakis was able to tell the claimant the identity of the customer in respect of whom the allegation was made. The claimant confirmed that he gave customers his personal email address for their use and, effectively, that he obtained their verbal consent. We note that the claimant did not give an unequivocal answer to this question and referred

again to previous implicit approval from Mr Bullock and Mr Beddall, neither of whom worked for the respondent any longer.

268. The claimant alleged that other sales executives contacted customers using their own email accounts and that managers were aware of this. Consequently, Mr Koulakis interviewed a number of other sales executives. All the sales executives confirmed that they did not contact customers using their personal email accounts, a number said they had been told not to do so, including by Mr Bullock, and some said that they had given customers their personal mobile numbers for the customer to contact them.

August sickness absence

269. The claimant agreed to visit his GP after the meeting and was signed off sick with work related stress from 16 August 2017. On 19 August the claimant wrote to the respondent explaining that he was off sick with stress but that as the source of his stress was the HR department, he could safely work at weekends as HR did not work then.

270. Mr Koulakis replied on 22 August confirming that the claimant would be paid SSP while off sick and that if he was unfit for work, it would not be appropriate for him to attend work at all. He was invited to provide further details as to how HR were causing the claimant problems and encouraged the claimant to sign the occupational health consent forms or update Mr Koulakis as to whether the claimant's GP would write a report.

271. The claimant responded on 27 August with a lengthy, aggressive email citing employment tribunal cases and case law relating to holiday pay, the upshot of which appeared to be that the claimant wished to take leave while on sick which Mr Koulakis agreed to on 29 August 2017.

272. The claimant returned to work on 7 September and attended a return to work meeting with Mr Koulakis. The claimant was expected to be working normal hours by this time, with voice rest at the start and end of the day.

Disciplinary invitation

273. On 8 September 2017, Mr Koulakis sent the claimant an invitation to a disciplinary hearing on 12 September 2017 for “Unauthorised possession of intellectual Company property”.

274. In our judgment, the documentary evidence of the claimant contacting a customer from his own email account, the claimant's admission that he did so, the consistent evidence from the other sales executives that this was not permitted and the three explicit instructions to use the Jardines email account on 5 October 2016 (Gary Phipps); 18 October 2016 (Paul Ivory); and 1 April 2017 were sufficient justification for the matter to be referred to a disciplinary hearing. We were taken to the claimant's policies

about this and the claimant sought to argue that using personal mobile phones for contacting customers (which was permitted) was the same as using personal email. Although there is some ambiguity in the respondent's IT policy as to the use of email on personal phones, any such ambiguity had been resolved by the clear instructions to the claimant to only contact customers using the Jardine's email account.

275. On 10 September 2017 the claimant sent in a further five page grievance, saying he was too busy to attend the disciplinary, he needed to obtain legal advice, he needed to conserve his voice for customers, a disciplinary hearing would exacerbate his stress, raising complaints about the investigation process, complaining that the company had required him to revert to his normal working hours as a "ploy" to avoid breaching the Working Time Regulations, raising issues about the absence of a sign saying he is on voice rest and challenging the factual basis of the allegations. Again, the claimant makes numerous legal references.

276. The claimant requested that the hearing be delayed until at least 22 September and that there be a grievance hearing before any disciplinary hearing. Mr Koulakis replied on 12 September agreeing to hear the grievance on 14 September and postponing the disciplinary hearing to 15 September.

277. The claimant replied on 13 September saying that his GP had advised him "not to attend an environment which would add to my stress" and explaining that he did not have time to prepare for the hearing. He also objected to Mr Koulakis doing both the investigations and the hearings. Ms Newell replied on the same day agreeing to a different person – Richard Roberts – hearing the matters, re-emphasising the need for medical advice about the claimant's ill health and warning the claimant that his absence was potentially putting his employment at risk. This was, in our view, a reasonable response.

278. The claimant sent a further, lengthy and aggressive email in reply concluding that he had sent a sick note to Mr Roberts and that he had agreed that all proceedings were "stayed". Ms Newell replied and gave the claimant a further week to sign and return the occupational health consent forms. The grievance and disciplinary hearings were rescheduled for 21 September. The claimant was offered the opportunity to provide written submissions.

279. The claimant sent a further lengthy, legalistic and aggressive email on 15 September in response, accusing Ms Newell of threatening him. The claimant did agree, however, to sign the medical consent forms and requested again a delay to the disciplinary and grievance proceedings.

Surrinder Virdee Statement

280. On 13 September, Surrinder Virdee signed a statement confirming that he had used his personal emails to contact customers when employed by Colliers and the respondent. Mr Virdee's subsequent statement to the respondent was that the claimant had coerced him into signing this statement which he then retracted. Mr Virdee was disciplined for this and on 2 October received a final written warning. It appears that Mr Virdee admitted that he had previously used his personal emails and that he wrote a false statement at the claimant's request. While these two admissions do appear contradictory, the narrative decision makes the outcome clear – that effectively Mr Virdee had provided evidence he did not believe to be true to assist the claimant under pressure from the claimant. We find that the respondent had a reasonable reason for concluding that the claimant had coerced Mr Virdee into providing a statement that he did not believe to be accurate.

Grievance against Joanna Newell

281. On 18 September 2017, the claimant submitted a further grievance, against Ms Newell and on 28 September a hearing was arranged for 6 October 2017, but the claimant was unable to attend due to ill health. It was rescheduled to be heard with the other outstanding matters, ultimately on 22 February 2018.

Occupational health report

282. On 26 September 2017, the claimant did attend a telephone appointment with the respondent's occupational health advisors. The recommendations in this report were that the claimant was not currently fit to attend work and that the outstanding workplace issues needed to be addressed before a successful return to work. It also stated that the claimant was not fit to attend any meetings at that time. A review was recommended for 4 – 6 weeks. Consequently, the outstanding disciplinary and grievance proceedings were postponed.

Commission

283. On 9 October the claimant wrote to Mr Koulakis asking for his commission statements. Mr Koulakis sent the claimant his statements on 12 October and confirmed that, in accordance with the claimant's conversation with Richard Roberts, he had been paid commission for his period of initial sickness at the end of August and beginning of September, but that the payment of commission was not sustainable from mid-September onwards.

284. There then followed a series of emails in which the claimant asserted that Mr Roberts had agreed to pay the claimant all commission in respect of all handovers while the claimant was off ill. The claimant referred to an email dated 13 September in which he says he confirmed previous

conversations with Mr Roberts to that effect. Mr Roberts says in an email to Ms Newell of 13 October that he had agreed to pay some commission initially but that that was subject to review depending on length of sickness. On 19 October 2017, Mr Koulakis responded to the effect that the decision to initially pay commission was a courtesy but that it was not confirmed that commission would continue to be paid for cars handed over by the claimant's colleagues.

285. There then followed a further series of emails in which the claimant asserted that he had a legal right to commission and Mr Koulakis asserted that commission was discretionary and, in any event, paid on delivery. On 25 October 2017, the claimant raised this issue as a further formal grievance. Ms Wood responded the same day to confirm receipt and that the grievance would be dealt with at the same time as the other outstanding grievances on the claimant's return to work. The claimant was unhappy with this suggestion and asked that the respondent consider his grievance on the papers with the proviso that oral evidence could be heard at an appeal if the claimant's grievance was unsuccessful. The respondent was concerned about involving the claimant in further processes in light of the Occupational Health report but, as Ms Wood explained if the claimant was fit to engage with this grievance all outstanding disciplinary and grievance meetings could be held on the same basis. Alternatively, the respondent would arrange another Occupational Health assessment.

286. In our view, this was a reasonable response. It was unreasonable for the claimant to seek to pick and choose which processes he would engage with to suit his convenience. However, following further correspondence from the claimant Ms Wood did agree to hear the claimant's commission grievance on the papers because of the claimant's financial concerns.

287. Ms Wood reviewed the telephone call (which was recorded) and emails and spoke to Mr Roberts and concluded that Mr Roberts had not agreed to continue paying commission. Mr Roberts states very clearly in his witness statement that he did not agree to continue paying commission. We have seen the emails and telephone conversation and we find that Ms Wood reached a reasonable conclusion. There is nothing in those communications to suggest that Mr Roberts agreed to continue paying commission. It is clear that the criteria in the definition of sale need to be met to obtain commission and the claimant was unable to fulfil that while off sick.

288. The claimant tried to show that the communications about this were contradictory. They were not. He also tried to rely on the fact that Mr Roberts had not immediately corrected his assertions about his agreement in their telephone call as evidence that Mr Roberts was agreeing with him. It is very clear from the context of those communications that he was not. We have heard the way the claimant repeatedly misinterprets, misunderstands or, even, misrepresents things and consider that it is more likely that the claimant was seeking to build

a narrative of something that did not happen, rather than accurately representing the conversation he had had with Mr Roberts.

289. The claimant also sought to argue in cross examination that the volunteering of information about forthcoming sales was consideration for the agreement to continue to pay him commission. Mr Roberts categorically denies this and we accept his evidence. This was a very surprising assertion. We find that Mr Roberts did not agree to continue paying the claimant's commission beyond the period for which it was paid and that this was a decision he was entitled to make.

30 October letter

290. As part of this grievance, the claimant sent a letter dated 30 October explaining that he could not access his payslips remotely. The claimant referred to section 8 of the Employment Rights Act 1996. We were not taken to any response to that letter, but Ms Wood says that the standard response would be to refer an employee to the payroll department directly. We also accept the evidence of Ms Newell that the online system is accessible from the claimant's devices – the claimant has given no good explanation as to why he was unable to access his payslips remotely and there is no evidence that he took any steps to resolve any IT issues he had.

Enquiry Max

291. On 11 November, the claimant wrote to Mr Koulakis raising the issue that he had been locked out of Enquiry Max, asking when this had happened and asserting that this amounted to a breach of the claimant's contract of employment. The claimant said that he needed access to prepare for his grievance hearing. Mr Koulakis was no longer the Head of Business at that time. On 15 November Mr Koulakis replied to the effect that he could not say when access was suspended but that he would provide any information the claimant needed in preparation for his grievance. The claimant then contacted Ms Wood who explained that as the claimant was off sick, his customers had been reallocated and there was no need for the claimant to access systems while off sick. She confirmed that access would be restored on the claimant's return to work and she also offered to provide any specific information requested for the grievance. The claimant did not request any information.

292. Neal Delo made the decision to suspend the claimant's access and reallocate the leads. His evidence was that this is normal practice to ensure that customers were properly looked after and to protect the personal data of those customers. In evidence Mr Delo said that a number of customers had complained that they had not received "follow ups". We accept Mr Delo's evidence that this had nothing to do with the fact that the claimant was bringing grievances – it was an unsurprising business decision. The decision of the respondent to suspend the claimant's access to Enquiry Max was reasonable. There was no need

for the claimant to be accessing this while off sick – his doctor had certified him as not fit for work, so he ought not to have been working.

Second occupational health referral

293. On 17 November 2017, Ms Wood contacted the respondent's occupational Health provider, Acorn, to arrange a further assessment of the claimant in light of his continuing absence from work. The appointment was originally arranged for 29 November but was rearranged to 6 December to accommodate the claimant and Ms Wood notified the claimant of that. However, on 6 December the claimant emailed Ms Wood to say that there was a mistake with the date from Acorn – it referred to 6 November instead of December and the claimant was now in Wales with his family until 19 December. The claimant had already agreed to attend on 6 December, if there was an obvious typo in the letter, it was incumbent on the claimant to check and he did not. In our view, the claimant was deliberately delaying his attendance with the occupational health advisers.

294. In response to the claimant's request to have an appointment after 19 December, Ms Wood offered to arrange one for 20 December at 9am but the claimant refused because he was concerned about the traffic. A further appointment was offered for 21 December at 2.30 to overcome this but the claimant again refused. Eventually, a meeting was arranged for 3 January 2018.

17 December complaint

295. On 17 December the claimant emailed Ms Wood setting out a number of complaints including (as far as is relevant to the claim):

    a. The company had failed to keep in regular contact with him. This was not correct – it was obvious that Ms Wood had been in regular contact seeking to arrange an occupational health assessment to facilitate the claimant's return to work
    b. The claimant had not been invited to the Christmas party. This was not correct. He had been invited on 11 September but had failed to read his emails. In any event, the claimant was in Wales on 16 December when the meal had occurred and agreed he did not want to attend.
    c. Requesting normal bank holiday pay for Christmas Day, Boxing Day and New Year's day. The claimant was advised to request payment for any leave he wanted to take while off sick in an email from Ms Newell on 18 December. It appears from the claimant's witness statement that he is not disputing that he ultimately received payment for these days, rather that he received payment at the end of January 2018.
    d. Requesting copies of his payslips. The claimant's payslips were sent by email and by post to his mother's address on 21 December, following an email from the claimant saying he could not open the

PDF copies, and thereafter. However, we accept the evidence of Ms Newell that the claimant's payslips were accessible to him online through the respondent's computer system. The only reason the claimant did not access them directly was because he had forgotten his password. The claimant gave no evidence that he had taken any steps to retrieve his password.

296. Ms Newell replied to that email on 18 December addressing all the points.

Occupational Health assessment – 3 January 2018

297. The claimant attended the second occupational health assessment on 3 January 2018. Ms Wood contacted the claimant and Acorn on 8 January to chase the Occupational Health report and to obtain a further fit note from the claimant. Acorn said that the claimant asked to see a copy of the occupational health report before it was disclosed to the respondent. On 10 January 2018 Ms Wood received a copy of a fit note by email from someone called Steve Griffiths who was said to be the claimant's cousin because the claimant was away from home and did not have internet access.

298. On 22 January 2018, Acorn said that Mr Griffiths had informed them that the claimant was speaking to a barrister before deciding whether to consent to the release of the occupational health report. On 26 January 2018 Acorn confirmed that the claimant had not given consent to the release of the occupational health report. They said that the claimant would not consent to the release of the report until they had agreed to the changes he requested, and they said they would not change their opinions.

299. In cross examination, the claimant said that the reason he refused to disclose the occupation health report was because it contained factual inaccuracies – he said some dates – and the Occupational Health adviser had not reviewed his medical records. At this point, the claimant had not disclosed the Occupational Health report in the proceedings.

300. The claimant was told of the need to disclose the occupational health report and he finally did disclose it on the penultimate day of the twelve day hearing. The claimant gave various explanations as to why he had not disclosed the report – that he'd forgotten about it, that it was inaccurate, that he couldn't find it and that he might not have it any longer.

301. It was perfectly clear, when the claimant did provide the report, that the reason he had not done so was because it says " In my opinion he is fit to attend a grievance appeal hearing and other hearings provided he has adequate support". He also provided a copy of a hand-written letter purportedly written on 4 February 2018 detailing the errors but which he said was sent on 23 or 24 January.

302. In our view, this is the clearest example of the claimant's dishonesty in these proceedings. The claimant was, as a personal injury lawyer of many years' experience, perfectly aware of the duties of disclosure. We find that the reason that the claimant did not disclose this letter to his employers or to the respondent in the proceedings is because it undermined his case. We also find that the claimant lied about the reasons for his failure to disclose the letter.

Contract change

303. On 5 February 2018, the respondent changed the pay and commission scheme for sales executives. The respondent notified other sales executives of this change but did not notify the claimant. No good reason was given for this failure. Ms Newell said the claimant would be told about the changes if and when he returned to work. The change resulted in an increase in the basic salary from £15,000 pa to £20,000 pa.

304. The respondent's case was that as this was an increase in pay, albeit that it was a change to the terms of the contract, no consultation was necessary. Ms Newell said that when the commission scheme changed each year without a change in base salary, there was no consultation so this was, effectively, no different. We were not provided with details of the change to the commission scheme.

305. While we agree that it is unlikely that most people would not object to an increase in their remuneration, we do not know what other payments were also affected. There was no good reason not to at least notify the claimant of this change at the same time as other employees and no reasons were advanced. We find that the respondent acted unreasonably in failing to notify the claimant of the change in the terms.

306. It is also clear form the letter in the bundle that there was some prior discussion of the proposed change with employees on 2 February and the claimant was not able to be a party to this discussion. No justification for this omission was advanced either. The claimant asserts in the list of issues that he found out about this change on 21 February 2018 but he does not mention it in any correspondence with the respondent or his resignation letter.

307. The claimant's case was that the reason the respondent had not consulted with him as because the decision to dismiss the claimant had already been made – it was the inevitable outcome of the disciplinary hearing. Ms Newell denied this in cross examination. It was not put to Mr Delo but in his witness statement he said that it was likely that the claimant would have been dismissed but he would not know that for sure until he had spoken to him. As Mr Delo's evidence was not challenged and he was the person who was to make the decision about the claimant's continuing employment, we find that the decision whether to dismiss the claimant had not been made before the hearing was scheduled to take place.

The hearings

308. On 9 February 2018, Ms Wood wrote to the claimant requiring him to attend for the outstanding disciplinary and grievance and grievance appeal meetings on 22 February before Mr Delo.

309. The disciplinary allegations the claimant now faced were

    a. Unauthorised possession of company intellectual property (the personal email issue)
    b. Deception or any action taken, calculated to assist others or yourself in such activities. (the Surrinder Virdee false statement issue)
    c. Incapability with regard to fulfilling your role (relating to the claimant's absence since September 2017)
    d. Failure to follow reasonable instructions and deliberate delaying of this process (relating to the raising of grievances, failure to comply with occupational health process and failing to attend meetings)

310. This letter was sent by special delivery post, email and standard first-class post; and Mr Line Hayward sent a text to the claimant informing him that a letter had been sent.

311. The claimant complains that this was overkill. However, the claimant did not acknowledge receipt of the letter and on 13 February Ms Wood emailed Mr Griffiths to inform him that an important letter had been sent to the claimant. In his witness statement, the claimant said he did not return to the Midlands until 18 February which was when he got the letters. In cross examination the claimant said he could not access his emails because he had an old iPhone 6s. In the circumstances, we find that the respondent acted wholly reasonably in taking the steps it did to ensure that the claimant received this letter as was borne out by the claimant's subsequent claims that he did not receive the letter until 18 February.

312. On 13 February, after the email from Ms Wood, Mr Griffiths sent a photograph of the claimant's apparently injured head to Ms Wood and Mr Delo saying that the claimant had had an accident involving a head injury but that he would be likely to recover early the following week (commencing 19 February) and would be travelling back on Sunday 18th. The copy of the picture in the bundle clearly, in our view, identifies the claimant as Asian. Mr Delo said in cross examination that he could not tell the claimant was Indian or Pakistani. He also said that he could not tell that the claimant was non-white in person it the hearing room. We do not accept that evidence – it is perfectly obvious that the claimant is of Asian heritage.

313. Ms Wood confirmed that the hearings would be going ahead, and the claimant could attend, provide written submissions or audio submissions. In response to that, Mr Griffiths asked for the hearings to be postponed as the claimant was not well enough to drive. This request was refused

on the basis that delaying would not have made any difference. We agree – the claimant had shown himself to be extremely inventive in finding ways to prolong his employment and delay the disciplinary hearing.

314. Mr Griffiths asked again on 20 February 2018 for the hearing to be postponed as the claimant was still suffering with major headaches. We were not shown any medical evidence to support these claims. We find it surprising that the claimant was unable to produce medical evidence if, as he says, he was concussed. In our view, the reason the claimant did not produce any medical evidence is because there was none, and he was exaggerating the seriousness of his symptoms. Ms Wood replied that as the claimant appeared to be capable of communicating with Mr Griffiths, the respondent considered him fully capable of producing audio submissions or attending by telephone.

315. On 21 February, Mr Griffiths sent another photograph of the claimant and asked again for the hearings on 22 February to be delayed. Ms Wood said that she did not consider it appropriate to delay the hearings as she did not think the claimant would ever consider himself fit enough to attend a hearing. The claimant did not challenge Ms Wood about this and we find that this was, in the light of the actions of the claimant over the previous months, a reasonable view to take.

Resignation

316. On 22 February, the morning of the scheduled hearings, Mr Griffiths sent the respondent the claimant's resignation letter. The claimant set out the following reasons for his resignation in that letter:

    a. Bullying and harassment;
    b. Breach of disciplinary/appeal internal and ACAS procedures;
    c. Unfair treatment and discrimination, acting in a dilatory and inconsistent manner;
    d. Violation of contract (i.e. attempting to backdate commission contracts, introducing unfair a terms, duress and undue influence, potential blackmail, allegedly changing disciplinary procedures without notice, etcetera)
    e. Contravention of employment law, Human Rights, Equality Act, Working Time Regulations etcetera
    f. Lack of training which affects my ability to perform my duties and places me in a potentially harmful situation (sales core process, manual handling, health and safety etcetera)
    g. Failure to provide personal protective equipment

317. The claimant also referred to a failure to deal with grievances and provide vital documents. The claimant refers to the "last straw doctrine" saying that he had waived previous breaches but is no longer willing to do so. The final straw the claimant appears to rely on in that letter is removing access to Enquiry Max, failing to provide payslips, seeking to continue with the grievance and disciplinary hearings on the same day and

proceeding to a disciplinary hearing when the claimant had head injuries and that the claimant's absence was caused by the respondent's actions.

318. The letter also records that the claimant prepared the letter some time ago and he has merely made some recent additions. The claimant said that he originally prepared a draft of the letter in the previous September having spoken to 'London' solicitors and only added recent incidents. We are prepared to accept the claimant's evidence about this, although the correspondence that the claimant sent throughout his employment was peppered with inaccurate and confusing legal references which would not be expected had a solicitor or barrister assisted in the preparation of any of those documents.

319. In our view, the real reason the claimant resigned was because he was confident he would be dismissed on 22 February 2018 and that was because he fully appreciated that he had acted inappropriately in the ways set out in the letter of 9 February 2018. Even by his own account, the alleged harassment at the hands of Mr Bullock was over a year old by this date and Mr Bullock had left the respondent in April 2017. Almost all the other matters relied on, for the reasons set out at length above, were either reasonable acts of the respondent or problems of the claimant's own making and could not possibly have formed the basis for a reasonable belief that the respondent was in fundamental breach of the claimant's contract of employment as he asserts in his resignation letter. The respondent did act unreasonably in failing to consult with the claimant about the changes to his remuneration in February 2018. However, we note that this is not explicitly referred to in the claimant's resignation letter despite him knowing about it the day before he submitted his resignation.

Increase in pay, payslips and holiday pay

320. The final matters that we are required to address are the impact of the change in the claimant's remuneration, outstanding payslips and holiday pay. The impact of the change in the claimant's remuneration was an increase in his pay for the last month. The claimant has clearly suffered no losses. He was unable to earn commission as he was off sick so that over all, the claimant was better off.

321. Pay slips were not sent to him timeously – payslips from September to December 2017 were sent in January 2018 and payslips for January, February and March were sent in March - but he was at all times able to access them remotely and the reasons he did not do so was because he did not take any steps to retrieve his password.

322. The claimant was unable to explain his claim for holiday pay. Eventually he said that as the holiday pay for 2017 was less than for 2016 he must have been underpaid. This was an entirely new way of putting his claim and there was no evidence either way. In any event, the holiday year runs from 1 January so that the only holiday pay that claimant was entitled to

on termination of his contract was the pro rata amount from 1 January 2018 until his resignation in 22 February 2018 and any carried forward under his contract of employment. In the absence of a clearly pleaded claim or any evidence the claimant has not shown that he was underpaid his holiday in any way at all.

The Law

Constructive unfair dismissal

323. In respect of the claimant's claim for unfair dismissal, the first question is whether the claimant was dismissed within the meaning of s 95(1) Employment rights Act 1996 (ERA). The respondent has not asserted any potentially fair reason for the claimant's dismissal within section 98 ERA.

324. Section 95 ERA sets out the circumstances in which an employee is dismissed, and s 95(1)(c) says that this includes circumstances where "the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct".

325. In *Western Excavating (ECC) Ltd v Sharp [1978] QB 761 the Court of Appeal confirmed that* questions of constructive dismissal should be determined according to the terms of the contractual relationship and not in accordance with a test of 'reasonable conduct by the employer'.

326. In *Malik v Bank of Credit and Commerce International SA [1997] IRLR 462*, *[1997] ICR 606* it was held that contracts of employment include the following implied term:

> *"The employer shall not without reasonable and proper cause conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee."*

327. The question for the tribunal to determine is therefore whether the respondent without reasonable and proper cause conducted itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee, thereby breaching its contract of employment with the claimant.

328. The claimant referred to *Retirement Security Ltd v Wilson* UKEAT/0019/19/JOJ as authority for the proposition that an unreasonable disciplinary investigation can breach the implied term of trust and confidence and we agree that it can. It is, however, clear from the Court of Appeal case *of Sattar v Citibank NA and another* [2020] IRLR 104 to which the claimant also refers that the question of whether the employer has acted fairly and reasonably is a question of fact for the tribunal.

329. If the respondent is in breach of the implied term of trust and confidence set out above, the tribunal must then determine if that breach was repudiatory – if it was sufficiently serious so as to allow the claimant to

treat the contract of employment as discharged.

330. Finally, the tribunal must decide whether, if there was such a breach, the claimant resigned in response to that breach.

Wrongful dismissal/breach of contract

331. An employee may bring a claim for breach of contract to the Employment Tribunal under the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 provided that the alleged breach of contract is outstanding on the termination of the employee's employment.

332. In considering whether a policy or other document is incorporated as a term of the employee's contract, the question is whether the term is apt to be incorporated. It is necessary to consider in their respective contexts the incorporating words and the provision in question incorporated by them. (*Keeley v. Foscroc International LTD* [2006] IRLR 961).

333. In respect of notice pay, section 86(1)(b) Employment Rights act 1996 provides that the notice required to be given by an employer to terminate the contract of employment of a person who has been continuously employed for one month or more is not less than one week's notice for each year of continuous employment if his period of continuous employment is two years or more but less than twelve years.

Direct discrimination because of race

334. Section 13 of the Equality Act 2010 provides:

(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

335. By virtue of section 9 of the Equality Act 2010, race is a protected characteristic.

336. Section 23 (1) provides

(1) On a comparison of cases for the purposes of section 13, 14, or 19 there must be no material difference between the circumstances relating to each case.

337. Section 136 provides

(1) This section applies to any proceedings relating to a contravention of this Act.

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

338. We refer to the case of *Igen Ltd v Wong* [2005] IRLR 258. That case says that the tribunal must consider all the evidence before us to determine whether the claimant has proved facts from which we could conclude that the respondent has committed the discriminatory acts complained of. We are entitled at that stage to take account of all the evidence but must initially disregard the respondent's explanation. We have also considered *Madarassy v Nomura International plc* [2007] ICR 867 in which it was held that the claimant "…only has to prove facts from which the tribunal 'could' conclude that there had been unlawful discrimination by Nomura, in other words he has to set up a 'prima facie' case". This means there must be more than just a difference in race and a difference in treatment - there must be something else. The claimant must provide evidence from which we could conclude that the reason for the difference in treatment was the claimant's race.

339. If we are satisfied that the claimant has proven such facts, it is then for the respondent to prove that the treatment suffered by the claimant was in no sense whatsoever on the grounds of his race.

340. The claimant also refers to the case of *Royal Mail Group v Efobi* [2019] EWCA Civ 18 in which the approach set out in *Igen* was affirmed. We refer also, however to paragraph 49 of *Efobi* where, referring to *Chief Constable of Greater Manchester v Bailey* [2017] EWCA Civ 425, [2017] TLR 96, Sir Patrick Elias cites Underhill LJ who said: *"Authoritative material showing that discriminatory conduct or attitudes are widespread in the institution may, depending on the case, make it more likely that the alleged conduct occurred, or that the alleged motivations were operative"*. The claimant also referred us to an article in the Guardian (16 January 2020) discussing the delegitimization of black people's voices by the use of phrases such as "playing the race card" and we have had regard to the views set out therein in the context of considering the "culture" of the respondent's workplace.

341. In respect of the comparators, we refer to *The Law Society and others v Bahl* [2003] IRLR 640 in which Elias J held that *"Once it is shown that a discriminatory reason has had a causative effect upon the decision, it will almost inevitably be an adverse one resulting in the victim receiving less favourable treatment than that which would have been meted out to the hypothetical comparator. In other words, the finding that the treatment was on the grounds of race or sex will almost always involve a finding of less favourable treatment" and that it is not necessarily "an error of law for a tribunal to fail to identify a hypothetical comparator or to determine the issue of less favourable treatment prior to asking the 'reason why' issue"*.

Harassment related to race

342. Section 26 – Harassment

    (1) A person (A) harasses another (B) if—

(*a*) A engages in unwanted conduct related to a relevant protected characteristic, and

(*b*) the conduct has the purpose or effect of—

(*i*) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.…

(4) In deciding whether conduct has the effect referred to in subsection (1)(*b*), each of the following must be taken into account—

(*a*) the perception of B;

(*b*) the other circumstances of the case;

(*c*) whether it is reasonable for the conduct to have that effect.

(5) The relevant protected characteristics are—

age;

disability;

gender reassignment;

race;

religion or belief;

sex;

sexual orientation.

343. The question of whether conduct is unwanted is to be assessed subjectively (*Thomas Sanderson Blinds Ltd v English* EAT 0316/10).

344. The question as to whether the conduct had the effect set out in section 26(1)(b) is to be assessed both subjectively and objectively in accordance with subsection 4. The question of whether it was reasonable for any conduct to have that effect is to be assessed objectively, but having regard to the perception of the claimant.

Unpaid annual leave under the working Time regulations

345. Regulation 14 of the Working Time Regulations 1998 provides that

(1) Paragraphs (1) to (4) of this regulation apply where—

(a) a worker's employment is terminated during the course of his leave year, and

(b) on the date on which the termination takes effect (“the termination date”), the proportion he has taken of the leave to which he is entitled in the leave year under [regulation 13] [and regulation 13A] differs from the proportion of the leave year which has expired.

(2) Where the proportion of leave taken by the worker is less than the proportion of the leave year which has expired, his employer shall make him a payment in lieu of leave in accordance with paragraph (3).

Unauthorised deductions from wages

346. In respect of the claimant's claim of unlawful deduction from wages, the relevant provisions of the Employment Rights Act 1996 are

347. Section 13 - Right not to suffer unauthorised deductions which says

(1) An employer shall not make a deduction from wages of a worker employed by him unless—

(*a*) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or

(*b*) the worker has previously signified in writing his agreement or consent to the making of the deduction.

348. Section 27 – meaning of 'wages' etc which says

(1) In this Part 'wages', in relation to a worker, means any sums payable to the worker in connection with his employment, including—

(*a*) any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise…

349. In *Agarwal v Cardiff University and Another* [2018] EWCA Civ 1434 the Court of Appeal confirmed that the tribunal does have the power to construe a contract with the purposes of determining whether any amount is probably payable.

350. The tribunal must therefore construe the contractual provisions to determine whether the claimant was entitled to be paid commission for the relevant periods and if so, how much he should have been paid.

The right to rest breaks during and between shifts and weekly rest

351. The relevant provisions are those in regulations 10, 11 and 12 of the Working Time Regulations 1998. They provide, respectively:

352. Regulation 10: Daily rest

(1) A worker is entitled to a rest period of not less than eleven consecutive hours in each 24-hour period during which he works for his employer.

(2) Subject to paragraph (3), a young worker is entitled to a rest period of not less than twelve consecutive hours in each 24-hour period during which he works for his employer.

(3) The minimum rest period provided for in paragraph (2) may be interrupted in the case of activities involving periods of work that are split up over the day or of short duration.

353. Regulation 11: Weekly rest period

(1) Subject to paragraph (2), [a worker] is entitled to an uninterrupted rest period of not less than 24 hours in each seven-day period during which he works for his employer.

(2) If his employer so determines, [a worker] shall be entitled to either—

(a) two uninterrupted rest periods each of not less than 24 hours in each 14-day period during which he works for his employer; or

(b) one uninterrupted rest period of not less than 48 hours in each such 14-day period, in place of the entitlement provided for in paragraph (1).

…

(4) For the purpose of paragraphs (1) to (3), a seven-day period or (as the case may be) 14-day period shall be taken to begin—

(a) at such times on such days as may be provided for the purposes of this regulation in a relevant agreement; or

(b) where there are no provisions of a relevant agreement which apply, at the start of each week or (as the case may be) every other week.

(5) In a case where, in accordance with paragraph (4), 14-day periods are to be taken to begin at the start of every other week, the first such period applicable in the case of a particular worker shall be taken to begin—

(a) if the worker's employment began on or before the date on which these Regulations come into force, on 5th October 1998; or

(b) if the worker's employment begins after the date on which these Regulations come into force, at the start of the week in which that employment begins.

(6) For the purposes of paragraphs (4) and (5), a week starts at midnight between Sunday and Monday.

(7) The minimum rest period to which [a worker] is entitled under paragraph (1) or (2) shall not include any part of a rest period to which the worker is entitled under regulation 10(1), except where this is justified by objective or technical reasons or reasons concerning the organization of work.

354. And regulation 12: Rest breaks

(1) Where a worker's daily working time is more than six hours, he is entitled to a rest break.

(2) The details of the rest break to which a worker is entitled under paragraph (1), including its duration and the terms on which it is granted, shall be in accordance with any provisions for the purposes of this regulation which are contained in a collective agreement or a workforce agreement.

(3) Subject to the provisions of any applicable collective agreement or workforce agreement, the rest break provided for in paragraph (1) is an uninterrupted period of not less than 20 minutes, and the worker is entitled to spend it away from his workstation if he has one.

355. Regulation 30(1) of those regulations says:

(1) A worker may present a complaint to an employment tribunal that his employer—

(a) has refused to permit him to exercise any right he has under—

(i) regulation 10(1) or (2), 11(1), (2) or (3), 12(1) or (4), 13 or 13A;

356. In *Grange (appellant) v Abellio London Ltd (respondent)* [2017] IRLR 108 the EAT clarified that

"*Adopting an approach that both allows for a common sense construction of reg. 30(1), read together with reg. 12(1), and still meets the purpose of the WTD, I consider the answer is thus to be found in the EAT's judgment in Truslove: the employer has an obligation ('duty') to afford the worker the entitlement to take a rest break (paragraph 32 Truslove). That entitlement will be 'refused' by the employer if it puts into place working arrangements that fail to allow the taking of 20 minute rest breaks (MacCartney). If, however, the employer has taken active steps to ensure working arrangements that enable the worker to take the requisite rest break, it will have met the obligation upon it: workers cannot be forced to take the rest breaks but they are to be positively enabled to do so*".

357. In our judgment, this is equally applicable to the rights afforded under regulation 10 and 11 as it is to that under regulation 12. Regulation 30 clearly applies to all provisions.

358. This means that the tribunal is required to consider whether the respondent has put into place working arrangements that fail to allow the taking of 20 minute rest breaks during each shift lasting more than 6

hours, a weekly rest break of at least 24 hours (or 48 hours in each two week period) or a rest break of 11 hours between shifts.

Failure to provide a statement of initial employment particulars - section 38 Employment Act 2002

359. Section 38 Employment Act 2002 provides

> (1) This section applies to proceedings before an employment tribunal relating to a claim by a worker under any of the jurisdictions listed in Schedule 5.
>
> (2) If in the case of proceedings to which this section applies—
>
> (a) the employment tribunal finds in favour of the [worker], but makes no award to him in respect of the claim to which the proceedings relate, and
>
> (b) when the proceedings were begun the employer was in breach of his duty to the worker under section 1(1) or 4(1) of the Employment Rights Act 1996 (c 18) (duty to give a written statement of initial employment particulars or of particulars of change) [or [(in the case of a claim by an employee)] under section 41B or 41C of that Act (duty to give a written statement in relation to rights not to work on Sunday),
>
> the tribunal must, subject to subsection (5), make an award of the minimum amount to be paid by the employer to the [worker] and may, if it considers it just and equitable in all the circumstances, award the higher amount instead.
>
> (3) If in the case of proceedings to which this section applies—
>
> (a) the employment tribunal makes an award to the [worker] in respect of the claim to which the proceedings relate, and
>
> (b) when the proceedings were begun the employer was in breach of his duty to the [worker] under section 1(1) or 4(1) of the Employment Rights Act 1996 [or [(in the case of a claim by an employee)] under section 41B or 41C of that Act],
>
> the tribunal must, subject to subsection (5), increase the award by the minimum amount and may, if it considers it just and equitable in all the circumstances, increase the award by the higher amount instead.

360. In *Govdata Ltd v Denton* UKEAT/0237/18/BA it was held that although failure to provide within the strict time limit set out in section 1 ERA is non-compliance, the words “when the proceedings were begun” at the start of s 38(3)(b) can only mean that the employer must have failed to

comply with the actual giving by the date of commencement of proceedings.

Reference under section 11 Employment Rights Act 1996 - failure to provide statement of initial employment particulars and failure to provide pay slips

361. Section 8 Employment Rights Act 1996 provides

> (1) A worker has the right to be given by his employer, at or before the time at which any payment of wages or salary is made to him, a written itemised pay statement.
>
> (2) The statement shall contain particulars of—
>
> (a) the gross amount of the wages or salary,
>
> (b) the amounts of any variable, and (subject to section 9) any fixed, deductions from that gross amount and the purposes for which they are made,
>
> (c) the net amount of wages or salary payable, . . .
>
> (d) where different parts of the net amount are paid in different ways, the amount and method of payment of each part-payment[, and
>
> (e) where the amount of wages or salary varies by reference to time worked, the total number of hours worked in respect of the variable amount of wages or salary either as—
>
> (i) a single aggregate figure, or
>
> (ii) separate figures for different types of work or different rates of pay.

362. Section 11(1) ERA provides

> (1) Where an employer does not give a worker a statement as required by section 1, 4 or 8 (either because the employer gives the worker no statement or because the statement the employer gives does not comply with what is required), the worker may require a reference to be made to an employment tribunal to determine what particulars ought to have been included or referred to in a statement so as to comply with the requirements of the section concerned.

363. Section 12 ERA provides

> (1) Where, on a reference under section 11(1), an employment tribunal determines particulars as being those which ought to have been included or referred to in a statement given under section 1 or 4, the employer shall be deemed to have given to the worker a statement in which those particulars were included, or referred to, as specified in the decision of the tribunal.
>
> (2) On determining a reference under section 11(2) relating to a statement purporting to be a statement under section 1 or 4, an employment tribunal may—
>
> > (a) confirm the particulars as included or referred to in the statement given by the employer,
> >
> > (b) amend those particulars, or
> >
> > (c) substitute other particulars for them,
>
> as the tribunal may determine to be appropriate; and the statement shall be deemed to have been given by the employer to the [worker] in accordance with the decision of the tribunal.
>
> (3) Where on a reference under section 11 an employment tribunal finds—
>
> > (a) that an employer has failed to give a worker any pay statement in accordance with section 8, or
> >
> > (b) that a pay statement or standing statement of fixed deductions does not, in relation to a deduction, contain the particulars required to be included in that statement by that section or section 9,
>
> the tribunal shall make a declaration to that effect.
>
> (4) Where on a reference in the case of which subsection (3) applies the tribunal further finds that any unnotified deductions have been made (from the pay of the worker during the period of thirteen weeks immediately preceding the date of the application for the reference (whether or not the deductions were made in breach of the contract of employment), the tribunal may order the employer to pay the worker a sum not exceeding the aggregate of the unnotified deductions so made.
>
> (5) For the purposes of subsection (4) a deduction is an unnotified deduction if it is made without the employer giving the worker, in any pay statement or standing statement of fixed deductions, the particulars of the deduction required by section 8 or 9.

364. The only case we were referred to was *Anakaa v Firstsource Solutions Ltd* [2014] IRLR 941 which is a decision of the Northern Ireland Court of Appeal and therefore not binding on us. It deals with an identically worded providing to that in s 8(1) above. In that case it was held:

"We accept that in the context of current standards of information technology the requirement to provide a written itemised pay statement is complied with if words are reproduced in a visible form on a computer screen. To that however we would add this caveat – if an employer is aware that an employee is having difficulty of any sort in actually accessing a payslip in this way, the employer is obliged to find an alternative method of providing information in accordance with the statutory requirement. Notwithstanding this caveat we agree that the tribunal was correct in law to dismiss this aspect of the appellant's claim".

365. We agree with this view. It is clear that "written" can include displayed on a computer or other screen. It is equally clear, in our view, that "to be given" in section 8 ERA can include "be given access to" in a conveniently accessible format. There is nothing inherently, conceptually, different between, on the one hand, giving access to a payslip by arranging for its delivery in an envelope through a letter box which requires the worker to retrieve the envelope and open it, and on the other hand giving access to a payslip by arranging for its display on a device (whether belonging to the worker or not) requiring the accessing a particular website and the inputting of a password provided that access to that website is available to the worker before they are paid.

Time limits

Conclusion

366. We now set out our conclusions on each claim.

Constructive unfair dismissal

367. The conduct that the claimant relies on as calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee are those incidents set out in the appendix under the "Schedule of Constructive Dismissal Chronology". A number of the matters set out in that chronology were clearly not acts of the respondent but acts of the claimant. We deal only with the acts of the respondent.

    a. Christmas meal – we have found that the claimant was invited to the Christmas meal
    b. Delayed holiday pay – we have found that the claimant was reasonably advised to request payment of holiday. His payment was delayed because he requested it too late for the payroll deadline.
    c. Respondent sent pay slips by recorded delivery – this was wholly reasonable

d. Initial refusal to send pay slips – the respondent reasonably believed that the claimant had access to online pay slips as he had been trained. The pay slips were sent when the claimant explained that he could not access them. This was reasonable.
e. Claimant's request for company sick pay on 12 January 2018. We have not heard any evidence that the respondent did reply to that request, but we note that the request came from Mr Griffiths, not the claimant. The claimant had previously been informed that he was entitled to statutory sick pay only. The respondent ought to have replied. However, we are aware that the claimant was not communicating directly with the respondent at this point (January 2018) and gave every appearance of seeking to avoid interactions with the respondent. The respondent's failure to respond to this request was not sufficiently serious to destroy or seriously damage the relationship of trust and confidence with the claimant.
f. Emails about disclosure of the occupational health report – we were not shown any of the emails on which the claimant relies and, from 10 January 2018, the respondent was communicating with the claimant's cousin at his request and said that he was unable to access his emails at the time. We find that this allegation did not happen.
g. Being notified of a disciplinary hearing and a grievance hearing on the same day by recorded delivery. The decision of the respondent to hold the hearings on the same day was reasonable. The claimant had failed to consent to disclosure of the occupational health report and had provided no medical evidence to support his claims that he was not well enough to attend. The respondent offered alternatives to the claimant including providing written or recorded submissions. It was clear that the respondent needed to bring matters to a conclusion, particularly as the claimant was refusing to communicate directly with them at this point and the respondent acted wholly reasonably.
h. Similarly, the respondent's decision to refuse to delay the hearings on two occasions in the absence of any evidence to support the claimant's request was reasonable.

368. It is clear that none of these acts amounted, either individually or cumulatively, to a breach of the implied term of trust and confidence.

369. We consider, finally, the failure to consult with the claimant about or notify the claimant of a change to his remuneration. We find that this was unreasonable conduct. The respondent offered no explanation as to why it had not even mentioned this to the claimant. The respondent's case that the claimant's pay in fact went up is beside the point. We do not know what other changes were included that might have had an impact on the claimant's remuneration over all.

370. However, we do not consider that this act was calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. The respondent had, throughout the

claimant's employment, dealt reasonably and fairly with all of the claimant's numerous complaints. It is clear that there were procedural flaws in some of the processes. However, in our view the respondent, and particularly the HR department, displayed a significant degree of patience in dealing with the claimant's aggressive, confusing and legalistic complaints. They had agreed to delayed changes to a contract previously and, in our view, it is more likely that the failure to consult with the claimant was an oversight. It was not *calculated* to destroy the relationship of trust and confidence and, in our view, given the respondent's previous response to complaints by the claimant, it was not likely to do so either.

371. For these reasons, therefore, the claimant was not dismissed and his claim for constructive unfair dismissal is unsuccessful.

Direct race discrimination

372. We consider initially whether the claimant has proven facts in respect of each allegation from which we could conclude the respondent has, because of his race, treated the claimant less favourably than it would others. In respect of comparators, the claimant has not pleaded any actual comparators except where explicitly mentioned. We conclude that he relies on a hypothetical comparator of non-Indian sales executive. In these incidents where the claimant has proven such facts, we then consider whether the respondent has shown that the treatment was for a reason wholly unconnected with the claimant's race.

373. Allegation (a) – we have found that Mr Bullock did not use the term "Rangoon" and he did not mimic an Asian accent or "side to side head wobble". In respect of these allegations the claimant has not shown facts from which we could conclude that he has been subjected to direct race discrimination. We have found that Mr Bullock did use the phrase "Chinky china man". However, this was in a meeting with other people who did not share the claimant's race. Any person of any race would be offended by this language and the claimant has not shown that he was subjected to less favourable treatment than any potential comparator who was also at the team meeting. In our view, this allegation is more accurately considered as harassment (see below).

374. Allegation (b) – we have found that Mr Bullock did not refuse the claimant's request for time off in lieu. The claimant has not shown facts from which we could conclude that he has been subjected to direct race discrimination.

375. Allegation (c) – in our judgment, the claimant has shown facts from which we could conclude that he was subjected to direct discrimination in respect of this allegation. The claimant was subject to unfavourable treatment. We conclude, from our findings, that Mr Bullock had previously used discriminatory language and there was a culture at Colliers where racist language was used. We refer to our finding that the reason Mr

Bullock decided to take action against other people, using racist language was for commercial reasons and we also refer to the use of "playing the race card" in Mr Bullock's statement (acknowledging that he was quoting someone else) as an indication of Colliers' potential to minimise discriminatory behaviour (see the Guardian article cited above). In our judgment, these facts together are sufficient to reverse the burden of proof in this incident and we could conclude that a hypothetical comparator would not have been denied time off.

376. However, we have also found that the reason that Mr Bullock refused the claimant time off was for reasons unconnected with his race – namely that the business was very busy and the claimant was needed to assist. We recognise that the grievance findings were that Mr Bullock could have handled the request more sensitively, but we have also found that Mr Bullock's management style was such that he behaved in the same way towards all his employees. The decision to refuse the claimant time off on 19 March 2016 was not because of his race.

377. Allegation (d) - see allegation (a) above. This is the same incident

378. Allegation (e) – this allegation was withdrawn

379. Allegation (f) – this comprises of two incidents of unfavourable treatment. Mr Bullock did call the claimant a liar and he did shout at the claimant to come upstairs. These are both instances of unfavourable treatment and for the reasons set out in respect of allegation (c) the claimant has shown sufficient facts to reverse the burden of proof.

380. However, the respondent has shown that both acts were for non-discriminatory reasons, namely that Mr Bullock reasonably believed that the claimant had lied and that Mr Bullock had a propensity to shout at all or the majority of his employees regardless of race.

381. Allegation (g) – the reasons that Mr Bullock refused to pay the claimant commission on the G sisters' cars was because they made a loss. The claimant agreed that they made a loss. This was manifestly the reason that commission was not paid and in our judgment, the claimant has failed to show facts from which we could conclude that he had been subject to race discrimination.

382. Allegation (h) – the claimant has failed to show facts from which we could conclude that he had been subject to less favourable treatment than a hypothetical comparator. Mr Bullock did not talk to the claimant in a demeaning or unpleasant way or subject him to any negative treatment at all.

383. Allegation (i) – Mr Bullock did ban the claimant from using his phone in meetings and we have found that it was likely that Mr Bullock did fail to praise the claimant. For the reasons set out in respect of allegation (c) the claimant has shown sufficient facts to reverse the burden of proof.

384. However, the respondent has shown that both acts were for non-discriminatory reasons, namely that the claimant was using his phone ringing as an excuse to leave the meetings and Mr Bullock reasonably wanted to stop that; and that the reason Mr Bullock did not praise the claimant as much as other sales executives (and the claimant refers to two comparators) was because of their difficult relationship which, in our view, arose because of the claimant's difficult and argumentative nature and Mr Bullock's forthright management style referred to above.

385. Allegation (j) – Mr Bullock did berate the claimant in public and, for the reasons set out in respect of allegation (c) the claimant has shown sufficient facts to reverse the burden of proof. However, the respondent has shown that the acts were for a non-discriminatory reason, namely that the claimant had made a mistake. The reason for the way in which the claimant was taken to task was because of the difficult relationship between the claimant and Mr Bullock which, in our view, arose because of the claimant's difficult and argumentative nature and Mr Bullock's forthright management style referred to above.

386. Allegation (k) – the claimant has failed to show facts from which we could conclude that he had been subject to less favourable treatment than a hypothetical comparator in respect of this allegation. There were reasonable reasons for the delay in arranging the mediation, some of which were due to the claimant and others which were as the result of unforeseen circumstances.

387. Allegation (l) – this allegation refers to the failure to take payment for a car but in fact related to the failure to take payment for roof bars. We found that Mr Bullock did not authorise the claimant to send the car out with roof bars on – it was the claimant's own decision and Mr Bullock did not decide to investigate the issue, it was Gary Phipps. The claimant has failed to show facts from which we could conclude that he had been subject to less favourable treatment by Mr Bullock than a hypothetical comparator in respect of this allegation.

388. Allegation (m) – we have found that it was the claimant's decision to deliver the cars in poor condition, not Mr Phipps', and it was Mr Phipps' decision to commence disciplinary proceedings, not Mr Bullock's. The claimant produced no evidence about the named comparators, and we heard no evidence about them. The claimant has failed to show facts from which we could conclude that he had been subject to less favourable treatment by Mr Bullock than the named comparators in respect of this allegation.

389. Allegation (n) – We have found that Mr Bullock acted wholly reasonably in respect of this allegation. The claimant has failed to show facts from which we could conclude that he had been subject to less favourable treatment by Mr Bullock than a hypothetical comparator in respect of this allegation.

390. Allegation (o) – Again, we have found that Mr Bullock acted wholly reasonably in respect of this allegation. The claimant has failed to show facts from which we could conclude that he had been subject to less favourable treatment by Mr Bullock than a hypothetical comparator in respect of this allegation.

391. Allegation (p) – This allegation arises out of incidents happening 7 months after allegation (o) and after Mr Bullock has left the respondent's employment. The decision to take disciplinary proceedings was wholly reasonable in the circumstances and the respondent did and had taken disciplinary proceedings against other employees in similar circumstances. For the reasons set out above, the circumstances of Mr Jones were not comparable but, in any event, there is absolutely no evidence to suggest that any of the respondent's decisions in this matter were in any way connected with the claimant's race.

392. The claimant has failed to show facts from which we could conclude that he had been subject to less favourable treatment than any comparator in respect of this allegation.

393. Allegation (q) – the claimant withdrew this allegation.

394. For these reasons, the claimant's claims of direct race discrimination are unsuccessful.

Harassment

395. Allegation (a) – except in so far as the allegation relates to the use of the phrase "chinky china man", we have found that Mr Bullock did not use any of the language alleged. We find, however, that the use of the phrase "chinky China man" was unwanted conduct related to race. The claimant made it clear on a number of occasions that such language was unwanted. Objectively, the conduct falls squarely within section 26(1)(b)(ii) in that, having regard to the perception of the claimant, having already raised allegations of discrimination on 20 March 2016, the use of such obviously racist terms in a team meeting would create an intimidating, hostile, degrading, humiliating or offensive environment for the claimant.

396. Allegation (b) – we have found this did not happen

397. Allegation (c) – we have found that this conduct was not related to the claimant's race as set out above.

398. Allegation (d) – see allegation (a)

399. Allegation (f) – we have found that this conduct was not related to the claimant's race as set out above

400. Allegation (g) - we have found that this conduct was not related to the claimant's race as set out above

401. Allegation (h) – we have found that the conduct complained of did not happen

402. Allegation (i) - we have found that this conduct was not related to the claimant's race as set out above

403. Allegation (j) - we have found that this conduct was not related to the claimant's race as set out above

404. Allegation (l) – we have found that the conduct relied on, said to have been perpetrated by Mr Bullock, did not happen.

405. Allegation (m) - we have found that the conduct relied on, said to have been perpetrated by Mr Bullock, did not happen

406. Allegation (n) – we have found that the conduct of Mr Bullock was wholly reasonable. It was not, related to the claimant's race and it was not reasonable for the conduct to have the effect of violating the claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant.

407. Allegation (o) – we have found that the conduct of Mr Bullock was wholly reasonable. It was not, related to the claimant's race and it was not reasonable for the conduct to have the effect of violating the claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant.

408. Allegation (p) - we have found that this conduct was not related to the claimant's race as set out above

409. Allegation (q) was withdrawn.

410. The claimant's claims of harassment are, with the exception of the allegation that Mr Bullock used the phrase "Chinky China man" (in respect of which see "Time points" below) unsuccessful for the reasons set out above.

Discrimination time points

411. The final act of discrimination on which the claimant relied occurred on 5 June 2017. The claimant commenced early conciliation on 5 March 2018 and submitted his claim form on 20 March 2018. This was 9 months after the last allegation. The last date for submitting a claim form (or commencing early conciliation) was 4 September 2017. The claimant's claim in respect of that allegation was 6 months and 16 days out of time.

412. The only allegation that we have found amounted to harassment occurred on 21 March 2016. The last date for submitting a claim form (or commencing early conciliation) in respect of that allegation was 20 June 2016. That claim is 20 months out of time.

413. We have had regard to the tests set out in *Keeble* (above). The claimant has advanced no credible explanation for the delay in bringing these claims. He said that he was concerned about the impact on his employment but, given the number of, and the manner in which, the claimant brought his grievances, this is not a credible argument. The claimant's correspondence with his employer is peppered with legal references, specifically in relation to employment law, and statements that he has substantial experience of employment Tribunal claims. This both undermines that claimant's assertion that he was concerned about raising complaints during his employment, while emphasising the fact that he ought, on the basis of his frequently implicitly asserted legal expertise, to have realised that he needed to bring any claims timeously. We refer, particularly, to the claimant's references to the Equality Act in his grievances and correspondence.

414. The respondent, conversely, acted reasonably and patiently in dealing with the claimant's complaints but has nonetheless had to face a barrage of confusing historical claims. It is clear that the cogency of the evidence of the witnesses seeking to deal with these issue has been affected.

415. In our judgment it is not just and equitable to extend the time for the presentation of the claimant's claims of direct discrimination or harassment and the Tribunal does not have the jurisdiction to hear the claimant's claims.

Unpaid leave

416. The claimant has failed to show that he was entitled to payment in lieu of any outstanding holiday on the termination of his employment and his claim is not successful.

Unauthorised deductions from wages

417. The claimant has failed to show that he had a right to be paid commission for cars he had been involved in selling while he was off sick in September 2017. The failure to make a payment to which the claimant was not entitled does not amount to an unlawful deduction from wages. This claim is therefore unsuccessful.

418. The claimant raised his grievance that he had not been paid this commission on 2 November 2017. We therefore conclude, as the respondent submits, that any payment was due by the end of October. Even assuming that was 31 October 2017, the last date from bringing a claim was 30 January 2018. The claimant's claim was therefore 7 weeks late. We note that in the intervening period the claimant was able to write,

or finish writing with assistance, a detailed letter of resignation and he had shown himself capable of writing many lengthy legal letters. The claimant has failed to show that it was not reasonably practicable for him to submit his claim within three months of the date of the alleged deduction and the Tribunal does not have jurisdiction to hear this claim.

Breach of contract

419. In respect of any alleged breaches of the disciplinary and grievance procedures, there is no evidence to support an assertion that these policies are incorporated as part of the claimant's contract of employment. The starting point must be the wording of the contract of employment and the policies themselves. These clearly state that the policies are not contractual. We are mindful that we must have regard to the surrounding circumstances, but, despite the claimant asserting in his submissions that these documents are incorporated into his contract of employment, we were not shown any evidence that would suggest there was an intention to incorporate these policies in to the claimant's contract of employment.

420. Further the particular alleged breaches are not pleaded in any detail and we were not referred to any specific alleged breaches of policy that might amount to a breach of contract. For these reasons, these claims are unsuccessful.

421. In respect of the allegation that the respondent was in breach of contract as a result of its unilateral decision to increase the claimant's pay and potentially amend its commission structure we are somewhat bemused. We were shown no evidence as to any change in commission scheme and, in any event, the claimant agreed it was discretionary. The only change applied to the claimant was the increase in basic pay. The claimant was not entitled to commission while he was off sick prior to his resignation. He was therefore paid, after the change, at least as much as he was entitled to under his contract prior to any change which necessarily includes the payment of the amount due under the original contract. There is, therefore, no breach of contract.

422. In any event, the claimant has suffered no losses. Finally, in respect of this issue, we note that the change was not implemented until after the claimant's resignation, in the March pay. This means that the tribunal does not have the jurisdiction to consider any breach in any event as any breach was not outstanding on the termination of the claimant's employment as required by the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994.

423. The claimant's claim for breach of contract is therefore unsuccessful.

Regulations 10, 11 and 12 Working Time Regulations 1998

424. Regulation 10 relates to the right to a break of at least 11 hours during each 24 hour period the claimant worked for the respondent. The only occasion in respect of which we heard any evidence was the delivery of cars to the G sisters on 15 September 2016. We have found that the decision to work late into the night was solely the claimants. The respondent did not, on this occasion, put into place any arrangements that prevented the claimant from exercising his right to a break.

425. This incident occurred on 15 September 2016. The last date for making a claim was therefore 14 December 2016. The claim is some 15 months out of time. The claimant has not provided any explanation for the delay and, in light of the claimant's lengthy legal correspondence and purported tribunal experience, it was reasonably practicable for the claimant to submit his claim within the time limit.

426. Regulation 11 refers to a weekly rest break of at least 24 hours. We heard no evidence or submissions about this at all and the claim, if it was intended to be brought, is unsuccessful and is dismissed.

427. Regulation 12 refers to the right to a break of at least 20 minutes where daily working time is more than 6 hours. The claimant was, until at least August 2017, working continuously for longer than 6 hours without a break. However, we have found that this was the claimant's own decision and, in fact, despite being told not to by Mr Koulakis and Ms Wood, on the last occasion on 3 August 2017. Accordingly, the respondent did not put into place any arrangements that prevented the claimant from exercising his right to a break.

428. The claimant was off sick continuously from 14 September 2017. Therefore, the very last date that the claimant could have been required to work through his lunch (although we have found that he was explicitly told not to by Mr Koulakis on 3 August 2017) was 14 September 2017. The very last date potential for making a claim was therefore 13 December 2017. The claim is three months and seven days out of time. The claimant has not provided any explanation for the delay and, in light of the claimant's lengthy legal correspondence and purported tribunal experience, it was reasonably practicable for the claimant to submit his claim within the time limit.

429. Accordingly, the tribunal does not have the jurisdiction to hear the claimant's claims for breaches of the Working Time Regulations.

Failure to provide pay slips

430. Having regard to the our interpretation of section 8 Employment Rights Act 1996 in light of the Northern Ireland case of *Anakaa v Firstsource Solutions Ltd*, we have found that the claimant was given by his employer, at or before the time at which any payment of wages or salary

is made to him, a written itemised pay statement. This was done by making the pay slip available to the claimant.

Failure to provide a statement of main terms

431. The claimant was provided with a statement of main terms of his employment shortly after he commenced employment in 2015 and again after the transfer to the respondent on 1 August 2017. The fact that he sent them back does not change that. There is therefore no need for the tribunal to determine what particulars ought to have been provided and this claim is unsuccessful.

Award under s 38 Employment Act 2002

432. The claimant has not been successful on any of his claims so that the Tribunal is not required to consider the applicability of section 38. However, we have found that the claimant was provided with a statement of main terms before he commenced proceedings so that no award is payable in any event.

433. For the foregoing reasons the claimant's claims are unsuccessful.

Employment Judge **Miller**

4 May 2020

Appendix – list of issues

CONSOLIDATED LIST OF ISSUES TAKEN FROM CMO 05/02/19 WITH REFERENCES INSERTED

4. The issues between the parties which potentially fall to be determined by the Tribunal are as follows:

Time limits / limitation issues

(i) Were all of the claimant's complaints presented within the time limits set out in sections 123(1)(a) & (b) of the Equality Act 2010 ("EQA") / sections 23(2) to (4), and 111 (2)(a) & (b) of the Employment Rights Act 1996 ("ERA") and/or regulation 30 of the Working Time regulations 1998 and/or the Employment Tribunals Extension of Jurisdiction Order 1994 (article 7)? Dealing with this issue may involve consideration of subsidiary issues including: whether there was an act and/or conduct extending over a period, and/or a series of similar acts or failures; whether it was not reasonably practicable for a complaint to be presented within the primary time limit; whether time should be extended on a "just and equitable" basis; when the treatment complained about occurred; etc.

(ii) Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before 6 December 2017 is potentially out of time, so that the tribunal may not have jurisdiction to deal with it.

Constructive unfair dismissal & wrongful dismissal

(iii) Was the claimant dismissed, i.e. (a) did the respondent breach the so-called 'trust and confidence term', i.e. did it, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously to damage the relationship of trust and confidence between it and the claimant? (b) if so, did the claimant affirm the contract of employment before resigning? (c) if not, did the claimant resign in response to the respondent's conduct (to put it another way, was it a reason for the claimant's resignation - it need not be the reason for the resignation)? If the claimant was dismissed, they will necessarily have been wrongfully dismissed because they resigned without notice.

(iv) The conduct the claimant relies on as breaching the trust and confidence term is:

As set out in the schedule below. Claimant said previous hearing that the 'last straw' which caused him to resign was the receipt, on about 16 February 2018 of a letter from the respondent dated ninth of February 2018 which confirmed that the respondent was going to proceed with allegations of gross misconduct against him.

Schedule of Constructive Dismissal Chronology (within 3 months of Resignation)

Date	Incident	Date of Knowledge
11/12/17	Claimant advised by colleague that a Christmas meal had been arranged on Saturday 16.12.17. Claimant had no knowledge.	
17/12/17 @ 14:03	Claimant issued email requesting confirmation that Bank Holiday Christmas and Boxing Day pay would be received in the December salary remittance and requested copy outstanding payslips. Respondent advised delayed payment.	18/12/17 @ 12:15
19/12/17 @ 07:25	Claimant requested copy outstanding payslips (September, October, November and December 2017) and in addition confirmation as to when bank holiday payment date would be.	19/12/17 @ 11:25
21/12/17 @ 08: 15	Claimant advised that the attached payslips in the documents emailed by the Respondent on 19/12/17 was not accessible.	
21/12/17 @ 08:49	Respondent sent out the payslips by recorded delivery.	21/12/17 @ 9:04
21/12/17 @ 10:14	Claimant emailed & suggested the outstanding late payslips be emailed - Respondent explained it was not part their policy.	
12/1/18 @ 14:55	Claimant emailed the Respondent's office manager, to ensure that Bank Holiday Pay (Christmas, Boxing and New Year's Day) was affected at the end of January 2018. Requested benefit of company sick pay, without reply.	
21/1/18-17/2/18	Claimant received a disproportionate amount of emails from the Respondent and the Respondent agents regarding disclosure of the medical report (which was factually inaccurate) – tantamount to harassment.	
5/2/18	Claimant issued letter to Respondent's Medical providers, Acorns, detailing a catalogue of errors in the medical report which required amendment, before disclosure to the Respondent (i.e. failed to review medical records).	
9/2/18	Respondent letter of invitations to hearings was sent by special delivery confirming notification of a Disciplinary Hearing on 22/2/18 followed by a Grievance Hearing and a Grievance Appeal Hearing, with a 10 minute break.	16/2/18
13/2/17	Claimant advised of head injury and sent pictures	

17/2/18 @ 09:34	Claimant issued additional addendum pictures of injuries.	
18/2/18 @ 23:12/13	Claimant emailed the Respondent's HR department, requested a postponement of hearing day due to significant injuries and issued additional updated photographic evidence of those injuries. Complained again about failure to pay holiday pay or issue payslips.	
19/2/18 @ 07:38	Claimant contacted Respondent's head of business at dealership concerning his inability to attend and the practicality of arranging for a colleague to appear at any hearing (Disciplinary/grievance) as it would require the Claimant to attend work and short notice, it would be difficult to find a colleague to attend. Requested release of payslips and also complained about failure to pay bank holiday pay.	
20/2/18 @ 11:19	The Respondent refused to delay the consecutively scheduled Disciplinary, Grievance and Appeal Grievance hearings.	
20/2/18 @ 15:48	Claimant re-issued the email of 18/2/18 @ 23:12, not having a cogent reply from the Respondent.	
20/2/18 @ 13:15	Claimant confirmed continuing major headaches and inability to prepare for the hearing, requesting that the matter be delayed again.	
21/2/18	Communication with a sales colleague who confirmed that all sales persons' contracts of employment and remuneration had been amended, following a meeting with all sales staff on 5/2/18.	
21/2/18 @ 13:07	Following a further plea to delay matters, the Respondent refused, despite being in receipt of updated graphic photos of the Claimant's injuries.	
22/2/18 @ 07:53	Claimant left with no option and issued a letter of resignation citing various breaches and issues. A further request was made for release of payslips (January and February 2018)	
22/2/18 @ 10:34	The Respondent issued an email accepting the Claimant's resignation, followed by issuing three hardcopy letters sent by - 1) Recorded delivery, 2) Special delivery and 3). First class post. The Respondent confirmed, after waiting 53 days, company sick pay would not be available.	23/2/18

(v) If the claimant was dismissed: what was the principal reason for dismissal and was it a potentially fair one in accordance with sections 98(1) and (2) of the Employment Rights Act 1996 ("ERA"); and, if so, was the dismissal fair or unfair in accordance with ERA section 98(4), and, in particular, did the respondent in all respects act within the so-called 'band of reasonable responses'? The claimant will rely (in respect of fairness) on the matters set

out at paragraphs 2.2.1 to 2.2.6 in the draft list of disputed issues provided for the preliminary hearing.

Remedy for unfair dismissal

(vi) If the claimant was unfairly dismissed and the remedy is compensation:

a. if the dismissal was procedurally unfair, what adjustment, if any, should be made to any compensatory award to reflect the possibility that the claimant would still have been dismissed had a fair and reasonable procedure been followed/have been dismissed in time anyway? See: *Polkey v AE Dayton Services Ltd* [1987] UKHL 8; paragraph 54 of *Software 2000 Ltd v Andrews* [2007] ICR 825; *W Devis & Sons Ltd v Atkins* [1977] 3 All ER 40; *Credit Agricole Corporate and Investment Bank v Wardle* [2011] IRLR 604];

b. would it be just and equitable to reduce the amount of the claimant's basic award because of any blameworthy or culpable conduct before the dismissal, pursuant to ERA section 122(2); and if so to what extent?

c. did the claimant, by blameworthy or culpable actions, cause or contribute to dismissal to any extent; and if so, by what proportion, if at all, would it be just and equitable to reduce the amount of any compensatory award, pursuant to ERA section 123(6)?

d. See also paragraphs 2.16 to 2.18 of the draft list of issues prepared for today's hearing;

2.16 Has there been an unreasonable failure by the Claimant to mitigate his losses (s.123(4) ERA) and if so what deduction (if any) should be made?

2.17 Is the Claimant entitled to claim in his schedule of losses for the "past loss of salary", being the difference between SSP and what his projected earnings would be as a consequence of illness caused by the Respondent?

2.18 Is the Claimant entitled to claim in his schedule of losses for the "loss of holiday pay", as a consequence of illness which reduced the earnings ratio, upon which average holiday pay is calculated? The Claimant alleges that the illness was caused by the Respondent?

EQA, section 13: direct discrimination because of race

(vii) Has the respondent subjected the claimant to the following treatment: as set out in the claimant's schedule of race discrimination provided following the last hearing, and specifically in relation to Scott Bullock between February 2015 and April 2017:

a. generally as set out in the second main paragraph of the claimant's email of 21 June 2018 (p103):

> *Mr Bullock's associated tenure affecting me, ran from Monday 2nd February 2015 until April 2016. There were so many incidents during which in morning meetings where he would make derogatory racial statements and mimicking, that it would be impossible to catalogue them. However, it was common for him to state and condone others using the following terms - "Rangoon", "chinky China man", derogatory physical mimicking of Asian's "side to side head wobble, with accent", negative attitude to Asian customers and comments - "you know what they're like" and so on.*

b. by refusing the claimant's request for time off in lieu of Christmas and New Year's Day in 2015/16 (p103);

c. by refusing the claimant's request for time off on or about 19 March 2016 in the circumstances set out at page 103;

d. on or about 21 March 2016, making the comment alleged on page 103 regarding that date;

> *21/3/16 - Mr Bullock referred to a Chinese customer as "chinky chinky china man".*

e. regarding 10 May 2016, Mr James clarified that the complaint is that Neil Thomas should have dealt with his grievance but instead referred it to David Clark, meaning that there could be no appeal;

f. on 12 September 2016 Mr Bullock and behaving as described on page 104 in respect of that date (the claimant confirmed that the first three paragraphs on page 104 are background information);

> *12/9/16 - The car handover to Mr Pxxxxx, cash balance issue arose on 13/9/16 - Mr Bullock shouted at me, in the public sales showroom "John upstairs now". Mr Bullock called a liar in accounts office Shane and Adam present). After a meeting with senior management, I was exonerated from any error.*

g. Mr Bullock's refusal to pay the claimant commission in the circumstances set out regarding 15 September 2016 on page 104;

h. on 20 September 2016 Mr Bullock accusing the claimant (unjustifiably) of failing to respond to a complaint call from a customer; see page 104;

i. the conduct attributed to Mr Bullock on 21 September 2016 on page 104;

> *21/9/16 - Mr Bullock banned me from using company phone in morning sales meeting complimented Mr Alan Wall and Mr Mike Perkins but not me for having*

EnquiryMAX diary up to date, without failure compared to everyone else. He took delight in praising other white staff but not me.

j. on 22 September 2016 Mr Bullock wrongly accusing the claimant of incorrectly completing paperwork regarding a prep ticket (as set out on page 104);

k. failing to arrange a reconciliation meeting between approximately May 2016 and April 2017 (as set out in the entry for 29 October 2016 on page 104/105) - the claimant stated that the entries for 27 September 2016 and 4 October 2016 are background information;

l. in October 2016 (on or about the 31st) Mr Bullock complaining that the claimant had not taken payment for Mr Vxxxxx's car, when Mr Bullock has in fact agreed to this (the claimant says that his colleague Adrian is his comparator);

m. on about 1 November 2016, an allegation that Mr Bullock commenced disciplinary proceedings against the claimant regarding the delivery of cars which were not correctly finished (postproduction) to the Gxxxxxx sisters, although the claimant had permission from head of business to deliver them (the disciplinary proceedings commenced by Mr Bullock in respect of the claimant's dealings with Gxxxxxxx sisters and Mr Vxxxxx were abandoned by the respondent); the claimant says that he has actual comparators, Mr Williams and Mr Simpkins;

n. an allegation that on or about 1 November, Mr Bullock attempted to stop the claimant carrying forward holiday for the Christmas period in 2015 (the claimant did later take the leave); the claimant confirmed at the other paragraphs on page 105 with background information;

o. 29th of November 2016, the claimant alleges that Mr Bullock attempted to blame the claimant for failing to provide FDA support to Dr Gxxxxxx; the claimant confirmed that the other material on page 106 was background material for his race claim;

p. On 5 June 2017, the claimant alleges that the management at the dealership, including Mr Duncan, Mr Clough and members of the human resources Department, directly discriminated against him by taking disciplinary action in respect of his failure to / delay in taking a final payment of £500 from a customer; the claimant initially said that his colleague C Jones was a comparator, but has subsequently clarified that the situation relating to Mr Jones was slightly different (but still an example of a white colleague being allowed to breach core sales procedure);

q. on 9 February 2018 (received by the claimant on 16 February) by the claimant being told that disciplinary allegations relating to him using his personal emails contact customer were being proceeded with; this is said to be discrimination by Mr Delo/the respondent's HR department.

(viii) Was that treatment "less favourable treatment", i.e. did the respondent treat the claimant as alleged less favourably than it treated or would have treated others ("comparators") in not materially different circumstances? The claimant relies on the comparators mentioned above and/or hypothetical comparators.

(ix) If so, was this because of the claimant's race and/or because of the protected characteristic of race more generally? Also (as added in by CMO of 29/03/19):

> *1.5 If the Tribunal finds that there was discrimination, did the Respondent take all reasonable steps to prevent such discrimination from occurring?*
>
> *1.6 If the Tribunal finds that there was discrimination, was Scott Bullock (or any other employee named above) acting in the course of his employment when carrying out the conduct of which the Claimant complains?*

EQA, section 26: harassment related to race

(x) Did the respondent engage in conduct as follows:

The claimant is directed to inform the respondent and tribunal which, (if any) of the allegations set out under direct discrimination above (and if so specifying which of subparagraphs a to q he relies upon) are alternatively said to be harassment related to race, within 14 days of the date of this order**. (NB C to clarify)**

(xi) If so was that conduct unwanted?

(xii) If so, did it relate to the protected characteristic of race?

(xiii) Did the conduct have the purpose or (taking into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect) the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

Unpaid annual leave - Working Time Regulations

(xiv) When the claimant's employment came to an end, was s/he paid all of the compensation s/he was entitled to under regulation 14 of the Working Time Regulations 1998?

See paragraphs 4.1 and 4.2 of the draft list of issues:

> *4.1 Do the Claimant's complaints relating to bank holiday pay constitute a freestanding claim for breach of contract/ unlawful deduction of wages as opposed to being part of the constructive unfair dismissal claim?*
>
> *4.2 If so. did the Respondent breach the Claimant's right not to suffer an unauthorised deduction from wages pursuant to section 13 Employment Rights Act*

1996 by failing to pay holiday for the following bank holidays: Christmas Day, Boxing Day?

And: What was the claimant's leave year?

(xv) How much of the leave year had elapsed at the effective date of termination?

(xvi) In consequence, how much leave had accrued for the year under regulations 13 and 13A?

(xvii) How much paid leave had the claimant taken in the year?

(xviii) How many days remain unpaid?

(xix) What is the relevant net daily rate of pay?

(xx) How much pay is outstanding to be paid to the claimant?

Unauthorised deductions

(xxi) Did the respondent make unauthorised deductions from the claimant's wages in accordance with ERA section 13 by failing to pay commission as set out in paragraph 3.1 of the draft list of issues (3.2 -3.6 being matters of evidence/argument) and/or by failing to pay holiday pay as above, and if so how much was deducted?

3.1 Did the Respondent breach the Claimant's right not to suffer an unauthorised deduction from wages pursuant to section 13 Employment Rights Act 1996 by not paying the Claimant commission for cars which he asserts he sold but were handed over by colleagues from 13 September 2017 onwards.

Breach of contract

(xxii) See paragraphs 5-7 of the draft list of issues.

5 BREACH OF CONTRACT, RELATING TO DISCIPLINARY PROCEDURE

5.1 Do the Claimant's complaints relating to breach of disciplinary procedure constitute a freestanding claim for breach of contract as opposed to being part of the constructive unfair dismissal claim?

5.2 If so, is the Respondent's disciplinary procedure contractual?

5.3 If so, did the Respondent breach an express or implied term of the disciplinary procedure?

5.4 If a breach is proven, what is the appropriate level of compensation?

6 BREACH OF CONTRACT, RELATING TO GRIEVANCE PROCEDURE

6.1 Do the Claimant's complaints relating to breaches of grievance procedure constitute a freestanding claim for breach of contract as opposed to being part of the constructive unfair dismissal claim?

6.2 If so, is the Respondent's grievance procedure contractual?

6 Extract from the parties' draft List of Issues (dated 25 January 2019)

referred to in the Tribunal's Record of a Preliminary Hearing dated 19 February 2019, in which the issues to be determined in the case are listed.

6.3 If so, did the Respondent breach an express or implied term of the disciplinary procedure?

6.4 If a breach is proven, what is the appropriate level of compensation?

7 BREACH OF CONTRACT, RELATING TO CHANGES TO REMUNERATION

7.1 Do the Claimant's complaints relating to changes to remuneration constitute a freestanding claim for breach of contract as opposed to being part of the constructive unfair dismissal claim?

7.2 Did the Respondent impose changes to the Claimant's contract in February 2018, relating to the Claimant's salary and/or commission scheme?

7.3 If so, on what date did those changes take effect?

7.4 If so, were those changes authorised by the Claimant's contract?

7.5 If so, was there a duty to inform the Claimant of any changes in the Sales Team contracts in writing?

7.6 If so, does a notification in the Claimant's wage slip at the end of March 2018, after a contractual change had been imposed, constitute an appropriate discharge of the Respondent's contractual obligations?

7.7 If the change was not authorised by the Claimant's contract, was the Respondent under a contractual duty to (a) notify the Claimant; (b) consult the Claimant; (c) discuss and allow the Claimant to exercise his right to accept or reject any such change of contract?

7.8 If changes were imposed to the Claimant's contract, on what date did he become aware of those changes (note; this relates to changes to his own contract, not to changes to other sales staff) and does the Tribunal have jurisdiction to hear the claim?

7.9 Did the Respondent amend every sales person's contract other than the Claimant and if so, was it correct?

7.10 What loss, if any. has the Claimant incurred, given that the Claimant's case is that his salary increased and although he argues that the commission structure changed, he was not earning commission at that time due to illness?

Remedy

7.11 If a breach is proven, what is the appropriate level of compensation?

Other claims

(xxiii) Breach of the Working Time Regulations, regulations 10 and or 11- last occasion said to be prior to the claimant's sickness absence from September 2017.

(xxiv) Award under section 38 of the Employment Act 2002: paragraph 9, draft list of issues;

9.1 Did the Respondent breach section I and/or 4 of the Employment Rights Act 1996 (Statement of Initial Employment Particulars; Statement of Changes) such that the Claimant is entitled to an award under section 38 of the Employment Act 2002?

9.2 If a breach is proven, what is the appropriate level of compensation?

(xxv) Reference under section 11 of the ERA 1996 : see paragraph 10 of the draft list of issues

10.1 Did the Respondent breach section 8 of the Employment Rights Act 1996 (Itemised Pay Statement) such that the Employment Tribunal should determine what particulars ought to have been included or referred to in the statement so as to comply with the section concerned.

10.2 Did the Respondent breach section I and/or 4 of the Employment Rights Act 1996 (Statement of Initial Employment Particulars) such that the Employment Tribunal should determine what particulars ought to have been included or referred to in the statement so as to comply with the section concerned.

10.3 If a breach is proven for s1, s4 and s8 ERA 1996, what is the appropriate level of compensation?

(xxvi) Costs

Remedy

(xxvii) If the claimant succeeds, in whole or part, the Tribunal will be concerned with issues of remedy and in particular, if the claimant is awarded compensation and/or damages, will decide how much should be awarded. Specific remedy issues that may arise and that have not already been mentioned include:

a. if it is possible that the claimant would still have been dismissed at some relevant stage even if there had been no discrimination, what reduction, if any, should be made to any award as a result?

b. did the respondent unreasonably fail to comply with a relevant ACAS Code of Practice, if so, would it be just and equitable in all the circumstances to increase any [compensatory] award, and if so, by what percentage, up to a maximum of 25%, pursuant to section 207A of the Trade Union & Labour Relations (Consolidation) Act 1992 ("section 207A")?

c. did the claimant unreasonably fail to comply with a relevant ACAS Code of Practice, if so, would it be just and equitable in all the circumstances to decrease any compensatory award and if so, by what percentage (again up to a maximum of 25%), pursuant to section 207A?